No. 6421

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

8

J. C. WALTON,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Procedure in the Case.

This case came on for trial on plaintiff's complaint and defendant's answer. At the close of the plaintiff's case a motion for nonsuit was made, (R., pp. 51-55) and granted, the court rendering an oral opinion. (R., pp. 55-57.) Judgment for defendant was entered accordingly. (R., pp. 24, 25.)

The Pleadings.

Plaintiff's complaint was in two counts. The first four paragraphs of each count are the same, the sec-

ond count incorporating by reference the first four paragraphs of the first count. (R., p. 6.)

Paragraph I of the first count alleges that the action is brought against a common carrier, being a railroad in interstate commerce, and is brought under the Federal Employer's Liability Act; that defendant's principal place of business is within the jurisdiction, and that the plaintiff is a resident of Alameda County and domiciled therein. These allegations speak as of August 1st, 1930, when the complaint was filed. (R., pp. 1, 2—as to filing of the complaint, R., p. 10.) The answer to this (R., p. 11) puts in issue the material allegations of the first paragraph, particularly with respect to the residence and domicile of the plaintiff, and as to the defendant denies interstate commerce "with reference to or relation to any matter referred to in the complaint." Paragraph II of the complaint (R., p. 2) alleges that at all times defendant was a common carrier by railroad in interstate commerce, and at the time of the accident, both plaintiff and defendant were engaged in intrastate commerce. Issue was joined. (R., pp. 11-12.)

Paragraph III alleges that on March 25th, 1930, at Colton, California, plaintiff was employed by defendant as a hostler's helper, that his duties required him to supply engines with fuel oil, and that on that day he was on the tender of defendant's locomotive No. 2604 supplying it with oil, and as incidental thereto it was necessary for him to handle an oil beam. These allegations are admitted, but the time of the

accident is corrected from 4 o'clock, P. M., to 3:15 o'clock, P. M., and the name of the apparatus used is corrected from oil beam to oil spout. The complaint then alleges that while plaintiff was so engaged "said locomotive engine backed automatically", and with such violence that plaintiff was struck by the oil beam and thrown against the cab and injured. The answer admits that while plaintiff was engaged in refueling the locomotive it backed, but denies that it backed automatically or suddenly or with any violence or with such violence that plaintiff was struck or thrown. (R., p. 12.) Appellant's brief assumes to state in several places that the engine backed automatically. An issue was made in this regard—this is not an admitted fact. It is of course an admitted fact that the engine backed, and that as a result plaintiff was injured, but all of the allegations as to how it backed are denied.

Paragraph IV alleges that at the time of the injury the engine was run under the oil beam by the hostler to be supplied with oil. This is admitted. Then follow the charging parts of the first cause of action. It is alleged (1) that the hostler's duty required him to be in the engineer's place in the engine, and that instead of remaining there while the engine was being supplied with oil the hostler left the cab "without any one taking care of or being in control of the throttle, or air brakes; that by reason of the negligence and carelessness of defendant's hostler" (a) "in the handling and operation of said locomotive engine

at said time, and'' (b) ''on account of his failure to be in a position to control and keep said engine standing stationary'' the engine automatically, suddenly and violently ran backwards and injured plaintiff; (2) that the engine was defective in that it had (a) a defective, leaky throttle, (b) the valves and air connections controlling the brakes were defective and out of repair, and (c) that when steam accumulated in the steam chest the throttle and valves and other connections and appurtenances were so out of repair and defective that they failed to hold the steam in its place; that by reason of (1) said defective condition of said engine, and (2) the failure of the hostler to remain in a position so he could control the engine, the engine ran away. (R., pp. 3-4.) All of these allegations are denied. (R., pp. 12-13.)

Paragraph V of the first cause of action (R., p. 4) then alleges that at the time of the accident plaintiff was supplying the engine with oil, preparing it to handle interstate commerce in interstate commerce traffic, and that the engine was being fueled preparatory to its use in interstate commerce, and that said engine was regularly assigned to handle interstate commerce. It will be noticed that these allegations undertake to characterize the engine as an instrumentality in interstate commerce, by reason of what will happen in the future, and by reason of the fact that it was then so definitely assigned to interstate commerce that it could be said that it was then being prepared for such commerce. It is admitted that the

engine was being supplied with oil, and that on some occasion "but not on any occasion referred to in the complaint", it was assigned to interstate commerce, and in this behalf it is alleged that at the time and on the occasion of the matters referred to in the complaint and in the answer, it was assigned "to handle and transport only intrastate commerce". (R., p. 13.)

Paragraphs VI and VII of the complaint then set out the alleged damage suffered. (R., pp. 4-6.) The answer admits certain of these allegations and puts the others in issue. (R., pp. 13-15.) The pleadings in this regard need not be detailed as no issue as to damages is presented here.

The second alleged cause of action, as already pointed out, incorporates by reference the first four paragraphs of the first cause of action, and the same answer is made to them as incorporated. In paragraph II of the second cause of action plaintiff sets out certain facts with respect to his employment, that his duties required him to supply locomotives with fuel oil and repeats the allegation that while at Colton he was on a tender supplying it with oil, that defendant's hostler, whose duty it was to remain in the cab and in control of the engine, negligently left his post of duty, leaving the engine unprotected, and that the engine suddenly and violently, of its own accord, ran backwards. Again, the answer admits that it was part of plaintiff's duty to fill the tanks with fuel oil, but denies that it was the hostler's duty to remain in the cab, that he negligently left the cab, and that the

engine backed violently or suddenly or of its own accord. (R., pp. 15-16.)

In paragraph III of the second cause of action plaintiff alleges that the defendant negligently and carelessly and "in violation of the Federal Boiler Inspection Act" (1) "failed to properly inspect said engine", and (2) used said engine and permitted it to be used while its (a) throttle, (b) valves and (c) steam chest and (d) other appurtenances were defective, in bad condition and unsafe to be operated in the service for which the same was being employed, and that by reason of the engine not having been sufficiently inspected and being unfit for service, plaintiff's injuries proximately resulted. The answer denies the allegations of this paragraph. (R., p. 16.) The rest of the second cause of action is taken up with a statement of injuries.

The answer then adds four separate defenses to each cause of action. The second and separate defense sets up plaintiff's contributory negligence. (R., pp. 18, 19.) The third and separate defense sets up assumption of risk. (R., pp. 19-20.) The fourth and separate defense sets up that the case falls within the Workmen's Compensation Act of the State of California, and that the Industrial Accident Commission provided for in said Act has sole jurisdiction of all matters with reference to plaintiff's injury. (R., pp. 20-22.) The fifth and separate defense sets up all of the facts contained in the fourth and separate defense, and in addition thereto, that defendant performed all

of the things required of it by the Compensation Act with respect to providing medical attention, and in addition paid to plaintiff and plaintiff received compensation, pursuant to said Act. (R., pp. 22-23.)

At the time the case went to trial, then, the pleadings admitted plaintiff's employment by the defendant, and his injury in the course of such employment. It is admitted that with respect to some of its business and activity the defendant is a common carrier by railroad engaged in interstate commerce. But issues were presented as to:

(1) Whether or not defendant was a common carrier by railroad engaged in interstate commerce at the time and in connection with the transaction, in the course of which plaintiff was injured;

(2) Whether or not at the time of his injury plaintiff was engaged in interstate commerce;

(3) Whether or not there was any negligence on the part of defendant with respect to the hostler leaving the cab, or with respect to the condition of the engine;

(4) Whether or not there was any defect in the locomotive such as would amount to a violation of the Boiler Inspection Act;

(5) Whether or not there was any proximate relation between any alleged negligence or defect, if any, and any injury to plaintiff, and

(6) Whether or not plaintiff was a resident and domiciled in Alameda County, California, at the commencement of the action.

In addition, assumption of risk was pleaded. Contributory negligence was set up but in so far as this action was under the Federal Employer's Liability Act that is not a defense in bar. The first defense with respect to the California Workmen's Compensation Act is of course only an affirmative statement of the denial of interstate commerce—that is, it applies only in the event that the transaction was one in intrastate commerce. The defense which adds to that the fact of acceptance of benefits under the Act of course presents a different problem.

The Facts.

On the 25th of March, 1930, the date of this accident, the defendant was a railroad company, and as to part of its activity engaged in interstate commerce. A part of its main line ran from Los Angeles toward and across the Arizona border. Colton was a station on this line. At Colton the defendant had a switch yard which was wholly within the State of California. (R., p. 28.) Plaintiff was employed by defendant, as he describes himself, as a hostler's helper, from January, 1930, to the time he was hurt on March 25th, 1930. (R., p. 29.) His duties included putting fuel oil in the tanks of locomotives. On March 25th he was preparing Engine No. 2604 "for the next shift that it

went out on; *I don't know whether it was 11 o'clock that night when one went out or 7 o'clock the next morning; the engine was supplied for one of those shifts.*" (R., pp. 29-30.) Lord, the hostler, had received this engine. When he received it the plaintiff got on and gave the signal to back. The engine was backed and spotted for the sand dome. Plaintiff, after putting sand in the dome, walked back across the top of the engine and the cab, got on the oil tank, and gave Lord the signal to back up and spot it for oil. On this particular engine water and oil can be taken with one spotting. Lord backed and spotted the engine to take oil, with the plaintiff on top of the oil tank. The engine was stopped perfectly still. When the engine was spotted the plaintiff pulled the oil beam over, opened the manhole, put the spout in the manhole and started to take oil. At that time when plaintiff "pulled the spout down, Lord, the hostler, was taking water. He came right up immediately when I told him we needed oil and while I was reaching for the hook and pulling the beam around he was taking water—getting ready to take water." (R., pp. 30-31.)

Lord left nobody in charge of the engine. After starting to take oil the plaintiff turned to look at his oil gauge, which was on the left-hand corner of the tank back of the fireman's seat. The engine was headed west. (R., p. 31.) The plaintiff was then on the west end of the tender next to the cab. As the plaintiff turned around to look at his gauge, Roxie, the en-

gine watchman, climbed into the cab. He immediately sat down on the fireman's seat and turned on the injector. The plaintiff looked at his gauge, saw that the tank was about filled, and turned around and started turning the oil beam. While he was in that position the engine moved back, the oil spout struck him across the chest, and knocked him off his balance. At this time Lord was still taking water. (R., pp. 31-33.)

This is the plaintiff's story. The plaintiff is the only one who testified as to any facts with respect to the accident. Such other testimony as was brought out will be touched on in discussing the precise issues presented.

ARGUMENT.

BURDEN OF PROOF.

It is an elementary proposition, which really needs no citation of authority, that before the plaintiff could recover here, he was required to sustain the burden of proving two things—a breach of some duty which the defendant owed to the plaintiff, and, second, that as a proximate result of that breach of duty the plaintiff was injured. If he fails as to either of these he can not recover. But the decisions of the United States Supreme Court, in cases such as this, have used more precise language, and language which is so apt here that we take the liberty of quoting it for the court's convenience.

The leading case, which has been repeatedly quoted, is *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 45 L. ed. 361. The plaintiff was a fireman. He attempted to step off his engine. The step turned. He fell and was injured. A verdict was directed in favor of the defendant for failure on the part of the plaintiff to prove negligence of the defendant proximately causing the injury. The court first pointed out the function to be performed by the trial court in such a case, and the respect to be paid to the trial court's determination, and said:

> "At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, *but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect for his judgment.*"

The court then said as to the facts and the failure of the plaintiff to make out a case:

> "Upon these facts we make these observations: First. That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a pre-

sumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (citing cases) *a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer was guilty of negligence.* (Texas etc. Co. v. Barrett, 166 U. S. 617.) Second. *That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, *it is not for the jury to guess between these half a dozen causes* and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In *Northern Ry. Co. v. Page,* 274 U. S. 65, 71 L. ed. 929, a case where a passenger was suing, the court said:

"The burden was on plaintiff to show that defendant's negligence, as specified above, was the proximate cause of his injuries. Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. Otherwise the judgment must be for defendant. *Chicago M. & St. P. R. Co. v. Coogan,* 271 U. S. 472, 478, 70 L. ed. 1041, 1045, 46 Sup. Ct. Rep. 564, and cases cited. *The verdict can not be sustained if essential facts are left in the realm of conjecture and speculation.*"

The *Coogan* case cited in the *Page* case was an action brought under the Federal Employer's Liability Act. The court pointed out that there the record left the matter "in the realm of speculation and conjecture. That is not enough." It further pointed out that in determining whether or not there was proof or mere conjecture or speculation the federal courts will follow their own rule. The court said:

"The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish is not subject to the control of the several states. This court will examine the record, and if it is found that as matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

In *New York Central R. Co. v. Ambrose,* 280 U. S. 486, 74 L. ed. 562, it was held that the plaintiff "completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. *The utmost that can be said is that the accident may have resulted from any one of several causes, for some of which the company was responsible and for some of which it was not. This is not enough.*" The court then quotes at length from the *Patton* case.

In *Atchison etc. Co., v. Toops,* 281 U. S. 351, 74 L. ed., 896, the court said:

> "*But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause,* and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

See, *accord:*

- *N. & O. etc. R. Co. v. Harris,* 274 U. S. 367, 62 L. ed. 1167;
- *St. Louis etc. Co. v. Mills,* 271 U. S. 344; 70 L. ed. 979;
- *Gulf etc. R. Co. v. Wells,* 275 U. S. 455, 72 L. ed. 370;
- *Davlin v. Henry Ford & Son.,* 20 Fed. 317 (C. C. A. 6th).

The above cases indicate that the *Patton* case has been consistently followed. They further indicate that the rule is definitely established that the mere fact of injury in the course of employment does not make out a case for the employee, and is not proof, either of breach of duty by the defendant or of the proximate causal relation necessary.

The foregoing cases further point out that it is not enough that the plaintiff's proof is consistent with liability on the part of the defendant. It is not enough that the plaintiff's injury may have been due to negligence or other breach of duty on the defendant's part. If it is equally probable, under the evidence, that it may have happened from some other cause, the plaintiff has not made out his case. We repeat and emphasize this, because it is the crux of the case in hand.

Appellant at pages 18 and 19 of the brief undertakes to discuss the rule to be followed in considering the sufficiency of evidence on a motion for nonsuit. It is of course elementary that conflicts are to be resolved in favor of the plaintiff. It is likewise true that every "fair" inference in favor of plaintiff is to be drawn. But this does not mean that if there are two equally reasonable inferences only one of which is favorable to plaintiff, that inference in favor of plaintiff is a "fair" inference. The above cases show that it is not. There is nothing in the two federal cases cited on page 19 which is contrary to any of the above cases. The *Hotel Woodward* case simply makes a passing reference to the general rule. *Shadoan v. Ry. Co.*, 220 Fed. 68, decided by the Sixth Circuit

Court of Appeals was not a case where several inferences could be drawn. In a case which recognized the rule that where there are several equally reasonable inferences the jury cannot be permitted to guess as between them, that court expressly distinguished the *Shadoan* case.

> *Davlin v. Henry Ford & Son, supra.*

In this connection we call attention to another well-established rule.

> "The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval in this jurisdiction as in many others."
>
> *Small Co. v. Lamborn & Co.,* 267 U. S. 248, 69 L. ed. 597.

> "*A mere scintilla of evidence is not enough to require the submission of an issue to the jury.* The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury may properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' * * * Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction

to the jury. (Citing cases.) '*When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.*' *Ewing vs. Goode,* (by Taft, Circuit Judge) (C. C.) 78 Fed. 442, 444. See *Patton vs. Tex. & Pr. Co.,* 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; *N. Y. C. R. Co. v. Ambrose,* 280 U. S. 486, *ante,* 562, 50 Sup. Ct. Rep. 198."

Gunning v. Cooley, 281 U. S. 90, 74 L. ed. 720.

In so far as there is anything in *Rabe v. Western Union T. Co.,* 198 Cal. 294, in conflict with the above cases it will not be followed by this court. The federal courts in this regard have, and follow, their own rules. In *Conrad v. Wheelock,* 24 Fed. (2d) 996, 999, the court said:

> "It has long been the rule in Illinois that, if there is any consistent evidence tending to establish the contention of the plaintiff, then it is the duty of the court to submit the cause to the jury."

It will be noticed that this statement of the Illinois rule is very much like the statement in the *Rabe* case. The court in the *Conrad* case goes on:

> "*The federal rule is different.* Where the evidence is undisputed, or is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, then it is the duty of the court to direct a verdict."

In *Ewing v. Goode,* 78 Fed. 442, cited with approval in *Gunning v. Cooley, supra,* Chief Justice Taft, then Circuit Judge, said:

> "The preliminary question for the court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that the defendant was unskillful or negligent, and that his want of skill or care caused injury. In the courts of this and other states the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the court must submit the issue thus made to the jury, with the power to set aside the verdict if found against the weight of the evidence. *In the federal courts this is not the rule.* According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant."

Accord:

Chicago etc. R. Co. v. Coogan, 271 U. S. 472, 70 L. ed. 1041, quoted above.

PROOF NECESSARY IN VIEW OF THE ALLEGATIONS OF THE COMPLAINT.

In sustaining the burden of proof the plaintiff can not, in this case, be aided by any inference or pre-

sumption. In the first place, there is ample authority for the proposition that in the federal courts a servant suing his master is not entitled to invoke the so-called *res ipsa loquitur* doctrine. See the cases above, particularly the *Patton* case. "The maxim of *'res ipsa loquitur'* does not apply where the relationship of master and servant exists." (*American Car and Foundry Co. v. Schachlewich,* 229 Fed. 559 (C. C. A. 8th). But we need not urge such a broad proposition here. "It is the established law of the courts of the United States that, to hold a master responsible for injuries to a servant, the servant must show by substantive proof that the master was negligent *in the manner alleged in the complaint, and that such negligence was the cause of the injury."* (*American Car and Foundry Co. v. Schachlewich, supra.*) And where the charge in the complaint is specific, then that specific charge must be proved—proof that the defendant may have been guilty of breach of some duty toward the plaintiff, not necessarily the one specified, will not do. The Supreme Court of California in an opinion written by Judge Wilbur stated the rule as follows in an action brought in the state courts under the Federal Employer's Liability Act:

> "The general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, *that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the neg-*

> *ligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply.*"
>
> *Conner v. Atchison, etc. R. Co.,* 189 Cal. 1.

In *Marovitch v. Central California Traction Company,* 191 Cal. 295, opinion by Judge Myers, concurred in by Judge Wilbur, then Chief Justice of California, the court said:

> "It is clear that where the plaintiff in his complaint makes no general allegation of negligence, or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given. This must be so for the reason that in such case *the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint.*"

And this case was followed in *McKeon v. Lissner,* 193 Cal. 297, where the court said that the plaintiff "can recover only upon proof of one or more of the acts or omissions alleged in the complaint".

The federal rule is the same. The leading federal cases are *Midland Valley R. Co. v. Conner,* 217 Fed. 956 (C. C. A. 8th) and *White v. Chicago etc. Co.,* 246 Fed. 427. These cases are cited by the Circuit Court of Appeals for the Ninth Circuit in *The Great Northern,* 251 Fed. 826, a passenger case, where the court said:

> "Again, the general rule is that, where the plaintiff in an action for negligence specifically

sets out in full in what the negligence of the defendant consisted, the doctrine of res ipsa loquitur has no application."

Accord:

King v. Davis, 296 Fed. 986;
Bean v. Independent Torpedo Company, 4 Fed. (2d) 405;
Fed. Electric Co., Inc. v. Taylor, 19 Fed. (2d) 122.

THE STATUTES INVOLVED IN THE LIGHT OF THE PLEADINGS AND PROOF.

We have pointed out that the charges in the pleadings by which it is sought to impose liability on the defendant are of two kinds—charges of negligence with respect to the conduct of the hostler, Lord, and charges of defects with respect to the engine itself. This division is made because there are federal statutes which deal with defects in equipment, and whose application is not affected by any question of negligence in the management of the equipment. These statutes are the so-called Federal Safety Appliance Act, which, with its amendments, now forms § § 1-16 of Title 45 of the United States Code; the so-called Ash Pan Act, which has become § § 17-21 of Title 45 of the United States Code, and the Federal Boiler Inspection Act, which has become § § 22-34 of Title 45 of the United States Code.

(In this connection we pause to point out that the United States Code is not a new enactment and enacts and repeals nothing. The provisions of the Code are only prima facie the law. In the codification of these acts a curious error crept into § 7, Title 45, of the Code. The Safety Appliance Act provided that where there was any violation of *that Act* assumption of risk should not be available as a defense. This was § 8 of the original Act of 1893. *No such provision was contained in the Ash Pan Act or in the Boiler Inspection Act.* All three of these acts are grouped in Chapter 1 of Title 45 of the United States Code. Section 8 of the Safety Appliance Act became § 7 of Title 45 of the Code. The reference there made to the cases in which the defense of assumption of risk should not be available was changed from cases of injury from equipment used "contrary to the provisions of *this Act*" to "contrary to the provisions of *this Chapter*". Grouped as the Boiler Inspection Act and the Ash Pan Act are in the same chapter of the Code, this provision of § 7 is too sweeping and goes beyond the original provision in the Safety Appliance Act. We pause to point this out, because this fact has this significance—if an action is founded on the Boiler Inspection Act alone, and is not a case which would also fall under the Federal Employer's Liability Act, the doctrine of assumption of risk is still available in spite of a breach of the Boiler Inspection Act. This would not be true in case of a breach of the Safety Appliance Act.)

There is no claim of any defect which would bring the case within the Ash Pan Act. There were allegations in the complaint which, it might be said, were sufficiently broad to warrant proof of violation of the Safety Appliance Act. But the only proof which was in anyway attempted, of any defect, or want of equipment required by statute, was attempted proof of defect in the locomotive's throttle. Such a defect, if there were one, would make a case only under the Boiler Inspection Act. We can, therefore, disregard the Ash Pan Act and the Safety Appliance Act, and look only at the section of the Boiler Inspection Act which is involved. (§ 23 of Title 45 of the United States Code.) This section provides that it shall be unlawful for a carrier to permit to be used any locomotive unless the same, its boiler, tender and all parts and appurtenances "are in proper condition and safe to operate in service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb", and unless the same are inspected as provided by the Act. There is in this case no proof with respect to inspection at all. It will be presumed that the statute is obeyed, and that there was the inspection required.

PLAINTIFF FAILED TO SUSTAIN THE BURDEN OF PROVING A PRIMA FACIE CASE OF VIOLATION OF THE BOILER INSPECTION ACT.

On this phase of the case the question presented is whether or not the plaintiff sustained the burden of showing that the throttle was not "in proper condition and safe to operate in the service to which the same" was put, "that the same may be employed in the active service" of the defendant "without unnecessary peril to life or limb", and that his injury proximately resulted from such breach of duty.

The rule as to burden of proof is not different under the Boiler Inspection Act from the rule in any other case. In *Ford v. McAdoo,* 231 N. Y. 155, 131 N. E. 874, suit was brought for a death, claimed to have resulted from a defect in a locomotive which constituted a violation of the Boiler Inspection Act. A judgment for the plaintiff was reversed because the evidence was insufficient to sustain the verdict. The Court of Appeals of New York said:

> "In the face of two reasonable inferences, each of which is consistent with the happening of the accident, the plaintiff has failed to meet the burden which the law places upon her. * * * One is as reasonable as the other; neither preponderates in weight of argument or likelihood. When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

A petition for a writ of certiorari was denied. (257 U. S. 641, 66 L. Ed. 411.)

The *Ford* case was followed in *Luce v. New York etc. Co.,* 205 N. Y. Supp. 273, 209 App. Div. 728, affirmed 239 N. Y. 601, 147 N. E. 212. The air pump on a locomotive had been squeaking and squealing. The engineer with the assistance of the fireman was working on it, both being on the ground. The engine moved and in some unknown way the engineer was run over and killed. There was no eye witness. The fireman had gone to the other side of the engine. A violation of the Boiler Inspection Act was claimed. The court said:

> "The burden of proof rested upon the plaintiff to prove, under the language of the Act, that the appurtenances of the locomotive were not in proper condition, and that they were not safe to operate in the service to which they were put, and to show the failure of the defendant to keep them in such state and proper condition, so as not to cause unnecessary peril to life or limb. * * * It is urged that the question of the condition of the engine is one of fact for the jury. In this case, it is a question of law. It is a failure of proof. The plaintiff has not proved any improper condition, nor any facts to show that the engine was not safe to operate in the service to which the same was put. The words 'proper condition' and 'safe to operate' must be read in connection with the words 'the service to which the same is put'. The engine might be in proper con-

dition for one purpose, and not safe to operate for another purpose; but the question to be solved, under the statute above quoted, is whether or not it meets the two requirements of being in proper condition and being safe to operate in the service to which the same is put, and not in some other service.

"Few authorities have been cited, and none need be, to solve the problem presented in this case. It has resolved itself into a question of sufficiency of proof. The Boiler Inspection Act requires a certain condition to exist. It is for the plaintiff to prove that it did not exist."

Compare the following cases where violations of the Safety Appliance Act were claimed. In *Midland etc. Co. v. Fulgham,* 181 Fed. 91 (C. C. A. 8th), the court said, after quoting at length, from *Patton v. Tex. & Pr. Co.,* supra:

> "*The case came to the trial court with the legal presumption that the defendant had furnished and maintained a lawful and operative lever and automatic coupler, for the legal presumption is that every one obeys the laws and discharges his duty.* * * * The result is that the conclusion of the jury that the coupler was defective was a mere conjecture; that there was no evidence in the case of any such defect; that the legal presumption that the defendant had furnished and maintained a lawful coupler was not overcome, but still prevailed; * * *; and that the guess of the jury was without substantial evidence to sustain it.

> "The doctrine of res ipsa loquitur is inapplicable to actions between employers and employees for negligence or other wrongs. The happening of an accident which injures an employee raises no presumption of wrong or negligence by the employer. (Citing cases.)
>
> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action—in this case of the alleged defect in the lift pin lever and the coupler—is indispensable to the maintenance of a verdict sustaining it."

See, *accord, McDonald v. Great Northern Ry. Co.,* 207 N. W. 194 (Minn.) where the court uses similar language as to conjectures and guesses of juries, and includes with juries witnesses. This thought will be commented on further.

In *Burnett v. Penna. R. Co.,* 33 Fed. (2d) 579, (C. C. A. 6th), the court said:

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such a case, there is no question for the jury."

This case was followed in *Kuhnheim v. Pennsylvania R. Co.,* 238 Fed. (2d) 1015 (C. C. A. 6th). Finally in applying the same rule the court in *Kansas*

City etc. Ry. Co. v. Wood, 262 S. W. 520, 523 (Tex.) said, quoting from *Ry. Co. v. Bounds,* 244 S. W. 1102 (Tex.):

> "It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective."

In the case in hand we have neither proof of a defective throttle nor proof of any causal connection between any condition of the throttle and plaintiff's injuries. We have in this case nothing but the bald unexplained fact that the engine moved. The facts in this regard have been stated above at page 8. That statement was not an outline. It was a full statement of the proof in the case.

There was not a word of evidence as to the condition of the throttle itself. There was no showing as to whether or not it had been looked at. There consequently was no direct evidence as to any defect in the throttle. But more than this there was no evidence of the results of any inspections. The Act requires that the engine be inspected. The rules of the Interstate Commerce Commission made pursuant to this statute, and of which judicial notice is taken by this court (*Thompson v. R. Co.,* 15 F. (2d) 28, 31 (C. C. A. 8th)), specifically provide for inspection of the interior and exterior of boilers (Rules 9-16), for an annual testing of boilers (Rule 17), which includes

the removal of the dome cap and the throttle stand-pipe (Rule 18), general monthly inspections and reports thereof (Rule 51), and inspection and report "after each trip or day's work." (Rule 104.) It is to be presumed that these reports were made as required. They must be filed as required by the Interstate Commerce Commission. Yet no attempt was made to produce any of these reports or to show from them any indication of any defect.

This accident happened within a few minutes after this engine had finished a shift. The plaintiff testified that he did not know from whom the hostler received the engine, but he did say that the engineer who usually worked that shift was Percy. (R., p. 30.) Yet no attempt was made by Percy or by any one else who had operated this engine, to show that there was any defect in the throttle. Lord, the hostler, who was handling the engine immediately before the accident, was not called nor any attempt made by him to show any defect. No attempt was made to show that any machinist who had ever worked on or around this engine had ever found any defect.

No attempt was made to produce any evidence of any difficulty in operating the throttle or of any steam leaks or other indications of a defect other than by inspection or operation. The record is an utter blank as to the throttle, and any fact in that regard. The only thing we have are some guesses of some witnesses, which will be dealt with presently.

There is no evidence in this case as to what actually happened in the operation of the locomotive. It appears that the hostler, Lord, stopped the engine, and then immediately got on the tender to take water. There is no evidence what he did with the brakes, whether he left them on or off, and if on whether the brake valve was left in the lap or service position, or was left partially in the release position, so that the brakes might leak off. There was no evidence as to how the reversing lever was left, whether in the center of the quadrant or in the forward or reverse position. The engine backed. If the reverser was in the forward position, then even if there had been a throttle leak the engine could not have backed, but would have gone forward. There is no evidence as to how the hostler left the throttle, whether closed or "cracked" or open. There is no evidence as to how the engine was brought to a stop; whether it coasted to a stop so that all steam pressure in the steam chamber and cylinders was already released, or whether it was stopped by use of the brakes with a head of steam still on the cylinder heads. There is no evidence as to whether or not the cylinder cocks were open so as to release any pressure which might remain on the cylinder heads. There is no evidence as to what went on in the cab of the locomotive after the hostler, Lord, left the cab. It does appear that Roxie, the engine watchman, climbed into the cab and turned on the injector. (R., p. 31.) It appears that he was in the cab before the engine moved. What else he did there does not appear.

It appears that the engine moved when the plaintiff was injured, and that it stopped. It does not appear how it was brought to a stop, whether it stopped itself, was stopped by applying the brakes, or was stopped by shutting the throttle.

Under these circumstances, it is impossible to say that the only fair inference to be drawn is, that there was a leaky throttle. It is an equally reasonable inference that the throttle was not closed. It is an equally reasonable inference that when the engine was stopped it was stopped with an unreleased head of steam on the cylinder heads. It is an equally reasonable inference that Roxie, the engine watchman, did something which caused the engine to move. These inferences are all inconsistent with any defect in the throttle, or any causal connection between any condition of the throttle and plaintiff's injury. There is little that can be added in this regard to the opinion of Judge Kerrigan, which will be found at pages 56 and 57 of the Record. There is, however, a federal case squarely in point.

In *Missouri etc. Ry. Co. v. Foreman,* 174 Fed. 377 (C. C. A. 8th), suit was brought for the death of freight conductor. The plaintiffs had a verdict and judgment thereon was reversed for insufficiency of the evidence to sustain the verdict. The facts were as follows:

The deceased was a conductor of a freight train. The drawhead on the car next to the engine pulled out. Because of other trains it was necessary to work

rapidly. The engineer immediately applied the brake, stopped the engine, and threw the reverse lever in the center of the quadrant as nearly as possible, got down from the engine and left it standing eight or ten feet from the car, leaving the fireman in the cab of the engine. Seeing what the trouble was the engineer went back to the engine, got a chain, and the deceased, the engineer, and a brakeman, were working between the rails chaining the car and engine together. (See pages 378 and 379.) At the point where the accident happened and where the engine stopped the track went downgrade going south, and the engine was going south. Accordingly, if it were to move by gravity, the engine would have moved away from the car. (Pages 382-383.) While the deceased, the engineer and the brakeman were thus working the engine backed upgrade and crushed the deceased between the drawhead of the engine and the car, killing him instantly. This suit followed.

In the complaint specific negligence was charged, it being charged that the air brake and appliances controlling the same were out of order and leaky, and that the throttle of the engine was out of order and leaked steam to such an extent as to cause the engine to move. Dealing with this question the court first quotes at length from the *Patton* case, and goes on:

> "As has been seen, plaintiffs charge in their petition such negligent act to have been committed by defendant in one of two ways: Either that defendant negligently permitted the air brakes and appliances to be and remain out of order and

in a leaky condition, which caused the brakes to release and the engine to move backward; or that the throttle of the engine was out of order and leaked steam to such an extent as to move the engine backward.

"If the efficient cause of the engine's backward movement originated in any act of the engineer himself, or of the fireman who remained on the engine, or in any other person, act, manner, or thing than those acts of negligence charged, plaintiffs may not recover, and it devolves upon the plaintiff to establish one or both of the negligent acts charged against defendant was the efficient cause of the moving of the engine to the exclusion of all others.

"The question now presented is: Did plaintiffs sustain the burden undertaken by them of producing evidence from which the jury was warranted in finding either or both acts of negligence charged was the efficient and proximate cause of the engine moving to the death of deceased? In other words, the evidence found in the record must return an answer to the question, what caused the engine to move? And that answer, when returned, must find either the one or the other, or both, of the negligent acts of defendant charged to exist as a fact, and such finding must be supported by the evidence, or the judgment entered may not stand."

The court then points out the significance of the fact that the engine moved upgrade, and then discusses a fact which does not appear in our case. The court says:

"Again, it is true, there is evidence in the record that the engine in question on the day of the accident leaked steam at the throttle; but the extent of such leakage is not shown, more than that the engine moved. It is argued, however, from these premises, as the engine did leak steam at the throttle, and as it did move backward, it will be presumed the engine must have leaked steam to such an extent as to show the railroad company negligent, or it would not have moved backward. This, however, is simply reasoning in a circle without established premises or necessarily correct conclusion, and for this reason: The presumption is that defendant furnished an engine reasonably suitable for the work to be performed by it, with appliances in reasonably safe condition for use; that is to say, it was not negligent in this regard. This presumption must be overcome by evidence before a recovery can be had on this ground.

"Again, the process of reasoning here employed is faulty and illogical, in that it bases the presumption of negligence on a presumption and not on an admitted or established fact; whereas a presumption of fact must be based on a known or established fact, and can never be founded on another presumption. (Citing and quoting from cases.)

"Again, it is further shown, by the same evidence, that all locomotive engines when in use leak steam to a greater or less extent at the throttle. Therefore, if this be true, the mere showing that this engine did leak steam at the throttle, without any showing of the extent, would

> not support the charge made. *The fact is, it cannot be determined from the evidence in this case what caused the engine to move."*

The court then discusses the question raised as to what the engineer did when he left the locomotive and points out that even if he left the locomotive as to brakes and the position of the reverse lever, so that it would move, and even if he were negligent in this respect, this would not help plaintiffs make out their charge that the throttle was out of order and leaked steam. There was evidence that this same engine had moved on another occasion when the engineer had left it, but the engineer who handled the locomotive on that occasion testified that he had released the brakes, and neglected to open the cylinder cocks, and thus relieved the pressure in the cylinder heads, and that this caused the locomotive to move. That explanation disposed of that evidence. The court then went on:

> "Considering all the evidence found in the record, and giving to it all just inferences derivable therefrom, in our judgment, it was impossible for the jury to determine what caused the engine to move to the destruction of Foreman. Therefore the verdict returned is not supported by sufficient evidence and the court, in the exercise of sound discretion, should have granted the request to instruct a verdict for defendant. *Patton vs. Texas & Pacific Ry. Co., supra,* and cases cited."

To meet the foregoing appellant does not point to any fact or any testimony as to any fact. Appellant seeks to meet this by showing simply the guess of a locomotive engineer who was not shown to be in anywise qualified to testify to the mechanical plan and operation of a locomotive, as a mechanic, or to testify with respect to a locomotive in any way except upon the empiric basis of an engineer who had operated locomotives, and the guess of Askew, who had once been a fireman but whose principal qualification offered was that he had been a brakeman and had ridden in the cab of a locomotive. These two gentlemen upon the theory that they were qualified to give an opinion undertook to guess that the cause of the movement of a locomotive was a leaky throttle.

This court is familiar with the proposition that opinion testimony which is not satisfactory will not support a verdict. (See *Cummins v. Virginia Ry. Co.*, 130 S. E. 258, where an opinion had been offered as to the leakage in a valve controlling steam.) Such testimony is to be judged, first, by its own intrinsic worth. The bald assertion of an opinion does not amount to the more than a scintilla of evidence required by the federal cases. In *McDonald v. Great Northern Ry. Co.*, 207 N. W. 194 (Minn.), where the question was as to the effectiveness of operation of brakes, the court said:

> "McCabe's testimony as to the things from which an inference is sought to be drawn of defective automatic brakes is, under all the cir-

cumstances, a mere guess. The improbability just mentioned makes it unsafe even as conjecture. It does not reach the dignity of proof. *Witnesses* and juries *must not be permitted to guess money or property from one person to another.* Substantial evidence must support those facts from which essential inferences are to be drawn for the support of a verdict. A verdict cannot rest on a conjectural foundation. * * * Liability is dependent on reasonably substantial proof."

In this regard we shall presently point out reasons why the guesses of these gentlemen are not substantial evidence in this case. But we pause now to point out that even on the assumption of fact made by these witnesses in making their guesses, their guesses were incorrect. These witnesses undertook to say that with the throttle closed and the reverse lever on center, two assumptions without foundation in the record, a leaky throttle would cause the engine to move. But this was contradicted by the plaintiff himself. Counsel for appellant seems to have overlooked the appellant's own testimony. He testified (R., p. 38):

"Q. Assuming that the brakes are not on, the reverser is centered, and the throttle is closed, is it your testimony that the only way to explain the movement of a locomotive is a leaky throttle?

"A. *I would not say that.*

"Q. I say, is there anything other than a leaky throttle which will explain an engine moving under those circumstances?

"A. *There might be some defective parts that would cause it to move.*"

And we may add that it might move even if there were no defective parts, as, for instance, as shown in *Missouri etc. Ry. v. Foreman, supra,* if the engine were stopped with unreleased pressure in the cylinder heads.

There are, however, more exact and precise reasons, why the guesses of these witnesses must be disregarded. In the first place, the very matter in issue was whether or not (a) there was a leaky throttle, and (b) this caused the engine to move. This was the matter for decision by the jury, or, in the absence of substantial evidence, for the court. These witnesses could not by undertaking to guess as to these facts, conclude the court or the jury as to the very matters in issue.

> "The danger involved in receiving the opinion of a witness is that the jury may substitute such opinion for their own, and the courts will not require parties to encounter this danger unless some necessity therefor appears. Accordingly, where all the relative facts can be introduced in evidence, and the jury are competent to draw a reasonable inference therefrom, opinion evidence will not be received. In the application of this rule it has been held unnecessary to rely upon the inferences of witnesses as to a fact when all doubt has been, or may be, set at rest by the use of the senses, either directly or through the use of plans, photographs or other exhibits.

"As the opinion evidence rule is intended to provide against the mischief of invasion of the province of the jury, a court should as far as possible exclude the inference, conclusion or judgment of a witness as to the ultimate fact in issue, even though the circumstances presented are such as might warrant a relaxation of the rule excluding opinion but for this circumstance. And it is usually regarded as proper to adopt the same course as to facts which are highly material to the issue."

22 *C. J.,* 498-504, cited with approval in *St. Louis etc. Co. v. Barton, infra.*

"Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing those conclusions of law or fact upon which the decision of the case depends. Although this view has been earnestly criticised it is sustained by the undoubted weight of authority, and *any lawyer who has had much participation in the actual trial of cases will understand that in many cases trials would become a mere farce if zealous experts were allowed to directly express their opinions upon the very issue to be tried.*"

Jones, Evidence, Civ. Cas., 3d Ed., § 372, p. 562.

The cases in support of this proposition are legion. We call attention only to a sufficient number to show that the federal and California rules are in accord.

In *Hatch v. U. S.,* 34 Fed. (2d) 436, 438-39 (C. C. A. 8th), a tax case, the court said:

> "Third, the questions called for conclusions of the witness as to the ultimate fact which the court was called upon to find, and for that reason the exclusion was proper."

In *Federal Electric Co., Inc. v. Taylor,* 19 Fed. (2d) 122 (C. C. A. 8th), the plaintiff had been injured when a shock from an electric sign upon which he was working threw him off a platform on which he was standing. An "expert" undertook to testify that the shock was due to a defect in the sign. The plaintiff had a verdict. On appeal this was reversed, and it was held that this opinion or guess might properly be disregarded.

In *St. Louis etc. Co. v. Barton,* 18 Fed. (2d) 96 (C. C. A. 5th), a pullman conductor was suing for injuries received when a train was derailed. There was a conflict in evidence as to the conditions which might have caused the derailment. Defendant's division engineer undertook to say that the derailment was caused by a broken rail. The court said:

> "The cause of the derailment being an ultimate fact to be determined by the jury, the court was not chargeable with error for sustaining an objection to a statement by the witness of his opinion on the subject."

In *Schmieder v. Barney,* 113 U. S. 645, 28 L. ed. 1130, 1131, the court said:

> "The effort was to put the opinion of commercial experts in the place of that of the jury upon

> a question which was as well understood by the community at large as by merchants and importers. This, it was decided in *Greenleaf v. Goodrich,* could not be done, and upon the point supposed to have been reserved in that decision this case stands just where that did."

In *Spokane etc. Co. v. U. S.,* 241 U. S. 344, 60 L. ed. 1037, the question presented was whether or not there had been a violation of the Safety Appliance Act. Judge Rudkin, then District Judge, had excluded the evidence upon the ground that it "invades the province of the jury". On appeal the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit. 210 Fed. 243. The case was then taken to the Supreme Court on writ of error, and the judgment was affirmed, the court saying:

> "Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instructions * * *."

In *Milwaukee etc. Ry. Co. v. Kellogg,* 94 U. S. 469, 24 L. ed. 256, 258, the court said:

> "The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not

permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge."

We pause to point out that in this case while the witnesses may have had superior knowledge, as to methods of operating a locomotive, the effect of a leaky throttle or an open throttle is a matter of common knowledge, and as to mechanical construction and operation of the locomotive, as a piece of machinery, as distinguished from its control by the engineer, they were not shown to have any superior knowledge. And of course as to the necessary element of causal connection, under no stretch of the imagination can that be said to be a matter for expert opinion in this case.

In *American Coal Co. v. DeWese,* 30 Fed. (2d) 349, (C. C. A. 4th), the court said:

> " 'Expert evidence touching matters of common knowledge is not admissible.' *Virginia Iron etc. Co. v. Tomlinson,* 104 Va. 249, 51 S. E. 362. 'Expert testimony can not be received either to prove, or to disprove, those things which the law supposes to lie within the common experience and common education.' Rodgers on Expert Testimony (2d Ed.) § 8; 1 Wharton on Evidence, § 436; *Johnston v. Mack Mfg. Co.,* 65 W. Va. 544, 64 S. E. 841, 24 L. R. A. (N. S.) 1189, 131 An. St. Rep. 979."

In *Safety etc. Co. v. Gould Coupler Co.,* 239 Fed. 861, 865 (C. C. A. 2d) the court said:

> "Opinion evidence, on the very point submitted for decision, is always incompetent."

In *Standard Fire Extinguisher Co. v. Heltman,* 194 Fed. 400 (C. C. A. 6th) the court said that the question of an expert,

> "called only for his conclusion as to the ultimate fact in issue, before the jury, and, under familiar rules, could not be received".

In *People v. Overacker,* 15 Cal. App. 620, 633, the court said:

> "That the matter upon which the witness was being examined was not proper to be proved by opinion evidence is established in the following cases *People v. Westlake,* 62 Cal. 309; *People v. Farley,* 124 Cal. 594, 57 Pac. 591; *People v. Milner,* 122 Cal. 181, 54 Pac. 833. In the case of *People v. Durrant,* 116 Cal. 217, 48 Pac. 85, it is said: 'Where the ultimate conclusion is one to be reached by the jury itself from the facts before it, and the so-called expert evidence is allowed, which presents to a jury a conclusion other than that to which they might have arrived, the admission of this improper testimony is tantamount to a declaration by the court that they may set aside their exclusive right of judging and accept the judgment of the expert.' "

Accord,

> *Cheney v. Employers' etc. Corp.,* 4 Fed. (2d) 826 (C. C. A. 9th);

Boyer v. U. S. F. & G. Co., 206 Cal. 273;
Davis v. Conn. F. Ins. Co., 156 Cal. 766;
Kroll v. Rasin, 96 Cal. App. 84.

There is a distinct reason why this "expert" testimony can not be considered. These gentlemen who testified were not giving their opinions based on any facts within their own observation. Their opinions were based entirely on an assumed state of facts—they testified in response to hypothetical questions or on an assumed hypothesis. It is apparent from the whole of the testimony of both Orth (R., p. 46) and Askew (R., p. 51)—appellant does not undertake to set out all of their testimony—that they were both assuming that the throttle was closed. Orth gave his opinion "when the reverse lever is on center and the throttle is shut off or closed"; "I don't believe it would move if the air was released and the throttle shut off". "When the engine is standing * * * and the throttle is closed". "That engine with the throttle closed". Askew's testimony was based upon the hypothesis "if the throttle is closed or shut off, if the reverse lever is on center".

There was no evidence that the reverse lever was on center. There was no evidence that the throttle was shut off.

> "As a rule hypothetical questions must be based on facts as to which there is such evidence that a jury might reasonably find that they are established."
>
> 22 *C. J.,* 714.

"If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be proved or offered to be proved; and if there is no evidence to prove such facts, or if the facts assumed, in the interrogatory are wholly irrelevant to the issue, the question should be excluded. If the foundation for the evidence is removed there is of course no basis for the superstructure. * * * The truth of facts assumed by the question is in doubtful cases a question for the jury; and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions; and the court will so instruct them. *But the court is not required to submit the matter to the jury, unless there is some substantial evidence tending to establish the hypothesis.*"

Jones, Evidence, Civ. Cas., 3d ed. § 371, pp. 559, 561.

In *Barnett v. Atchison etc. Ry. Co.,* 99 Cal. App. 310, 317 (hearing by Supreme Court denied) the court said:

"The opinion of a witness upon assumed facts differing from those shown by the evidence can not be given any probative force (*Estate of Purcell,* 164 Cal. 300, 308, 128 Pac. 932), and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence."

In *North Am. Acc. Ass'n. v. Woodson,* 64 Fed. 689, (C. C. A. 7th) the court said:

> "It is a proposition too simple to require any citation of authorities that the material facts assumed in a hypothetical question must be proven on the trial, or rather that there must be evidence on the trial tending to prove them. * * * Evidence of experts who are allowed to give an opinion is always attended with a sufficient degree of uncertainty and danger when founded upon an assumed state of facts which appear on the trial, on which the evidence tends to prove, and which the jury must find proven. If counsel can, in advance of knowing what he will be able to prove on the trial, frame his questions as he pleases, putting into them supposititious statements from his own invention and ingenuity, wholly unsupported by evidence, then the danger of this rather unreliable kind of testimony will be increased a hundred fold."

In *Union Pac. R. Co. v. McMican,* 194 Fed. 393, 396 (C. C. A. 8th), the court said:

> "Hypothetical questions should not embrace facts not in evidence. While counsel may base a hypothetical question upon his theory of the correctness of conflicting evidence, it is error to embrace facts which are not disclosed by the evidence."

In *Philadelphia etc. Co. v. Cannon,* 296 Fed. 302, 306, (C. C. A. 3d) the court said:

> "It scarcely needs the citation of authorities to sustain the proposition that a hypothetical

question calling for expert opinion must be based on facts in evidence. We are of opinion, therefore, that the question was improperly framed and the answer erroneously admitted. (Citing cases.)"

Accord:

Johnson v. Clark, 98 Cal. App. 358;
Erie R. Co. v. Linnekogel, 248 Fed. 389, 392 (C. C. A. 2d);
Harten v. Loffler, 212 U. S. 397, 53 L. ed. 568, 574.

The foregoing citations should be sufficient. If further cases are desired they will be found cited in *Corpus Juris* and in *Jones,* op. cit.

On this branch of the case it is now respectfully submitted that there was no attempt to show any defect as alleged except with respect to the throttle; that with respect to the throttle there is no evidence aside from the bald fact that the engine moved; that there are other inferences to explain this movement equally as reasonable as an inference of a defect in the throttle, that is, the inference that the throttle was open, or the inference that there was unreleased pressure in the cylinder heads, to mention only two. Under the circumstances there was nothing for the court to do but grant defendant's motion. When all is said and done there is little, if anything, which can be added to Judge Kerrigan's opinion on this point. (R., pp. 56-57.)

THERE WAS NO EVIDENCE TO SUPPORT THE CHARGE OF NEGLIGENCE ON THE PART OF THE HOSTLER.

The only charges in the complaint, other than charges of defects in the engine, upon which a cause of action could be rested, were the charges that the hostler in charge of the engine was negligent "in the handling and operation of said locomotive engine" and was negligent in failing to remain in the cab and in a position to control the engine. It will be noticed that these charges are very precise. It was *these* charges, not some other charge, that had to be proved. See cases pages 19 et seq. above and following.

There was no evidence at all to support the charge of negligence in handling or operating the engine. There is no evidence at all as to what the hostler did in handling and operating the engine. There is no claim now that the plaintiff's case can be supported on this charge. Plaintiff in this regard is remitted to the charge that the hostler was negligent in leaving the engine cab.

There is not a word of evidence upon which any claim of negligence on the part of the hostler can be founded as to this last charge. The evidence shows one thing, and one thing alone, and that is, that the hostler, after bringing the engine to a stop, did in fact leave the cab.

The appellant realizes this and seeks to meet this proposition by arguing that there was testimony that it was the duty of the hostler not to leave the cab,

that this evidence was improperly stricken out, and that this ruling of the court constitutes reversible error.

To this argument there are a number of answers. In the first place the striking out of this testimony was proper. In the second place, even if improper, the error was harmless. Had this testimony remained in the case and been believed still the court must have granted the motion for a nonsuit, on any one of three grounds, that is, want of a showing of proximate causal connection, showing of assumption of risk, and want of a showing of facts making applicable the Federal Employer's Liability Act. We take these propositions up in their order.

The only testimony attempted as to the duties of a hostler was that of the plaintiff, Walton, recalled on his own behalf (R., p. 48, et seq.). He was asked what the duties of a hostler were. Certain of the duties of a hostler were then stipulated to, and then, on behalf of the defendant, an objection was made "to any question to this witness on the ground that it is without foundation and calling for the conclusion of the witness." (R., pp. 48-49.) The following then occurred:

> "The COURT. He may testify to *facts,* and *not* to *conclusions.*
>
> "Mr. McCUE. *Certainly, your Honor. It is not my purpose to ever call those things out.*
>
> "The COURT. Proceed."

The reporter then read the question, which was whether or not the plaintiff knew what a hostler's duties were. He answered "Yes". This, of course, was the baldest kind of a conclusion itself. The Record then goes on:

> "Q. You will please state what they were.
>
> "Mr. Dunne. I make the objection that it calls for the conclusion of the witness and is without foundation. This man is not a hostler. No foundation is shown.
>
> "The Court. Q. This is the first time you ever worked with a hostler, is it not?
>
> A. I worked, your Honor, off and on before I was assigned a steady job, a few times with a hostler.
>
> Q. With a hostler?
>
> A. Yes, as extra.
>
> The Court. I will overrule the objection; exception.
>
> A. The hostler's duty was to have the engine in charge at all times, have it under his control at all times, sit in the engineer's seat, where he had access to the throttle, the air, and all manipulations which run in stopping an engine while I was doing my work on the engine, until I got through." (R., p. 50.)

This last answer was then stricken on motion. It was the worst sort of a conclusion and was utterly without foundation. No attempt was made to show that there were any rules or regulations or instructions governing the duties of a hostler. Nothing in the

way of an evidentiary fact is offered. The only thing offered is the conclusion of the witness, unsupported by any foundation other than his own conclusion that he knew what the duties were, and the fact that he had worked with a hostler a few times "as extra". Certainly a plaintiff can not be permitted to swear himself into court by stating any such conclusion as to the very matter which is to be submitted to the jury. Plaintiff had alleged in his complaint that this was the hostler's duty, and the verified answer had denied this. We need not repeat the argument and citations already made that opinions and conclusions as to the very matter to be decided by the jury can not be permitted. See above at page 38. We call particular attention to the language quoted from *Jones* above at page 39.

There is a distinct reason why the ruling of the lower court, in excluding this evidence, must be affirmed. The competency of a person to give an opinion is, in the first instance, a matter for decision by the court, and the trial court will be reversed only for plain error and abuse of its discretion. There is no such showing here.

The rule is plain. In the *Chateaugay etc. Co. v. Blake,* 144 U. S. 476, 36 L. ed. 510, 512, the court said:

> "How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial

court, and its ruling thereon will not be disturbed unless clearly erroneous. (Citing cases.)"

In *Congress etc. Co. v. Edgar,* 99 U. S. 645, 25 L. ed. 487, 490, the court said:

> "Whether a witness is shown to be qualified or not as an expert, is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. (Citing cases.)"

In *Hamilton v. Empire etc. Co.,* 297 Fed. 422, 430 (C. C. A. 8th), the court said:

> "The decision as to the qualification of an expert witness is peculiarly within the province of the trial court, and should not lightly be set aside. The trial court has a reasonable discretion in passing upon such qualifications which will be respected by the appellate court in the absence of a clearly erroneous ruling. (Citing cases.)"

The rule has been recognized and applied in this Circuit. In *Pacific etc. Co. v. Warm etc. Dis't.,* 270 Fed. 555, 558, this court said:

> "It was for the court below to determine whether they were qualified to testify. In *Still-*

well Mfg. Co. vs. Phelps Railroad Co., 130 U. S. 520, 527, 9 Sup. Ct. 601, 603 (32 L. ed. 1035), Mr. Justice Gray said: 'Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; 'and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law.' And in *Montana Railway Co. vs. Warren,* 137 U. S. 348, 353, 11 Sup. Ct. 96, 97 (34 L. ed 681) Mr. Justice Brewer said: 'It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge.' That rule was followed by this court in *Union Pac. Ry. Co. v. Novak,* 61 Fed. 573, 580, 9 C. C. A. 629."

Epperson v. Midwest Refining Co., 22 Fed. (2d) 622 (C. C. A. 8th);
Minnesota etc. Co. v. Swenson Evap. Co., 281 Fed. 622 (C. C. A. 8th);
Sacramento etc. Co. v. Soderman, 36 Fed. (2d) 934 (C. C. A. 9th).

Though it is obvious that the witness's own opinion as to his qualifications is no ground for questioning the court's determination, we give the cases on this proposition. In *Mars v. Panhandle etc. Co.,* 25 S. W. (2d) 1004, 1007, the court said:

"The statement of a witness that he testifies from his own knowledge does not necessarily qualify him to testify as an expert. He must

> show that he has such experience and has such knowledge as would qualify him to testify as an expert."

Accord,

> *Staats v. Hausling,* 50 N. Y. Supp. 222;
> *Snyder v. State,* 70 Ind. 349.

For the converse proposition that a man may be qualified as an expert, although he says he is not, see *Southern etc. Co. v. Evans,* 116 S. W. 418, 422. The court after stating the general rule that the witness's qualifications were to be determined by the court, says of the witness's own statement in that regard:

> "His statements that he was or was not an expert would be mere conclusion upon his part, and his character should be determined by the qualifications which he exhibits rather than by his own conclusion."

Before appellant is entitled to a reversal appellant must not only show error in excluding this conclusion of the plaintiff but must show that such exclusion was prejudicial. If we make the rather violent assumption that the plaintiff should have been permitted to give this sweeping and general conclusion as to the hostler's duties, still that doesn't aid him. This testimony could not have changed the result. Even if it were in the case, and even if believed, the result must have been the same, because, assuming that breach of this duty was negligence, there was (1) no showing of

any causal connection between this assumed negligence and the injury, and (2) plaintiff assumed the risk of injury from the conduct of the hostler in leaving the cab.

THERE WAS NO PROXIMATE RELATION BETWEEN THE ACT OF THE HOSTLER IN LEAVING THE CAB AND PLAINTIFF'S INJURY.

No argument is necessary for the proposition that no recovery can be had under the Federal Employer's Liability Act for claimed negligence unless that negligence was a proximate cause of the injury complained of.

> *Atchison etc. Co. v. Sweringen,* 239 U. S. 339, 60 L. ed. 317;
> *Atchison etc. Co. v. Toops, supra,* p. 14;
> *New York C. R. Co. v. Ambrose, supra,* p. 14;
> *Northern Ry. Co. v. Page, supra,* p. 12;
> *Patton v. Tex. & P. R. Co., supra,* p. 11.

There was no evidence at all as to how or why this engine moved. The facts in this regard need not be repeated. Plaintiff, having failed to show how or why the engine moved, certainly failed to show that anything that the hostler, Lord, did, or did not do, caused it to move, or that by remaining in the cab the hostler could have prevented it from moving. Indeed the fact that absence of somebody from the cab was not a proximate cause of the moving of the engine is demonstrated by the fact that it moved while there was

someone in the cab. Roxie, the engine watchman, got into the cab before the engine moved, and was there when it moved. If being in the cab would have prevented this accident, the engine watchman would have prevented it. A conclusion of proximate relation between the act of Lord in leaving the cab and the later movement of the engine can be founded only upon guess and speculation, unsupported by any suggestion of fact by the record.

PLAINTIFF ASSUMED THE RISK OF INJURY FROM ANY ASSUMED NEGLIGENCE ON THE PART OF THE HOSTLER IN LEAVING THE CAB.

It is elementary that assumption of risk is a defense in actions under the Federal Employer's Liability Act. The United States Supreme Court states the rule as follows:

> "It seems to us that § 4 in eliminating the defense of assumption of risk in the cases indicated quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. * * * Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; * * *. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risk may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are

necessarily fraught with danger to the workman, —danger that must be and is confronted in the line of his duty. * * * And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care * * *. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. * * * When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the risk will be remedied, the employee assumes the risk even though it rises out of the master's breach of duty."

Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062.

"And, except as provided in § 4 of the Act, the employee assumes the ordinary risks of his employment; and when obviously, or fully known and appreciated, he assumes the extraordinary risks *and those due to negligence of his employer and fellow employees."*

Delaware etc. Co. v. Koske, 279 U. S. 7; 73 L. ed. 578.

The court has also had occasion to point out that the rule is peculiarily applicable where the employee's "knowledge of the situation and danger" "was at least equal to that chargeable against the defendant". (*Toledo etc. R. Co. v. Allen,* 276 U. S. 165, 72 L. ed. 513.)

And see, generally, *accord:*

> *Missouri etc. Co. v. Aeby,* 275 U. S. 426, 72 L. ed. 351;
> *Baughan v. N. Y. etc. Co.,* 241 U. S. 237, 60 L. ed. 977;
> *Jacobs v. Southern R. Co.,* 241 U. S. 299, 60 L. ed. 970;
> *Southern Pacific Company v. Berkshire,* 254 U. S. 415, 65 L. ed. 335.

For cases holding that the doctrine of assumption of risk applied where the employee was injured as a result of an act of a fellow servant see, particularly, the following:

> *C. & O. Ry. Co. v. DeAtley,* 241 U. S. 310, 60 L. ed. 1016;
> *Chicago etc. Ry. v. Ward,* 252 U. S. 18, 64 L. ed. 430;
> *C. & O. Ry. Co. v. Nixon,* 271 U. S. 218, 70 L. ed. 914.

If we assume that it has been proved that Lord was negligent in leaving the cab, and if we make the farther assumption that there was proof that this negligence was a proximate cause of the injury, still, as

matter of law, plaintiff could not recover. He assumed the risk of injury from such act. The plaintiff was the one who called to Lord, and whose statement to Lord was what caused Lord to "immediately" leave the cab and get up on the tender and take water. This is the act. Plaintiff had notice of that act. His knowledge of the situation and danger was at least equal to that chargeable against Lord or the defendant. At that time he was in possession of all of the facts. The danger, if any, created by Lord's act in leaving the cab was as much open to his observation and was appreciated by him just as much as it could have been or was appreciated by anybody else. He had all the data before him and yet spoke no word of protest. He continued his work and assumed the existing situation.

Upon these violent assumptions the assumed negligence of Lord was in putting himself in a position where he could not control the engine if it moved. If there was this risk plaintiff knew it and assumed it. The fact is simple and extended argument can not make it any plainer than a simple statement.

It is respectfully submitted that any assumed error in striking the testimony of the plaintiff with respect to the duties of a hostler was harmless.

PLAINTIFF FAILED TO PROVE FACTS BRINGING HIS CASE WITHIN THE FEDERAL EMPLOYER'S LIABILITY ACT.

There is a distinct ground for denying plaintiff relief, which makes any assumed error with respect to

evidence as to negligence immaterial. Plaintiff founded his action so far as negligence is concerned on the Federal Employer's Liability Act. He failed to bring himself within the terms of that Act. The important section of that Act is the first, now § 51, Title 45, U. S. Code, and so far as material here it provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence"

of a carrier or by reason of insufficiency of its equipment.

The question presented here is not the power of Congress to deal with injuries to employees of interstate carriers, but is a question of construction of an actual exercise of that power which, as will appear, falls short of the broadest scope of the power itself.

A reading of the Act indicates that "it is essential to a right of recovery under the Act not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce". He must be engaged "in such commerce" at the very time of his injury. "What his employment was on other occasions is immaterial, for, as before indicated the Act refers to the service being rendered when the injury was suffered".

(*Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556, 60 L. ed. 436, 438.)

The authorities in support of the foregoing proposition are numerous, but the proposition is so important in this case that we take the liberty of quoting some of them. In *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177, 60 L. ed. 941, a switchman was injured while moving cars loaded with coal from a storage track to the coal shed. It was held that no recovery could be had under the Act, as it was not shown that the cars were then engaged in interstate commerce. The court said:

> "So, also, as the question is with respect to the employment of the decedent at the time of the injury it is not important whether he has previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed."

In *Louisville & N. R. Co. v. Parker,* 242 U. S. 13, 61 L. ed. 119, a fireman on a switch engine was killed while moving an empty car from one switch track to another. The court applied the above rule, and said:

> "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois C. R. Co. vs. Behrens,* 233 U. S. 473, 478, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A., 153, and doing the act for the purpose of furthering the later work."

In *Erie R. Co. v. Welsh,* 242 U. S. 303, 61 L. ed. 319, to be noticed in more detail presently, the court said:

> "By the terms of the Employer's Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

Accord:

Illinois C. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216;
Shanks v. Delaware L. & W. R. Co., supra;
N. Y. etc. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298;
Mayor v. Cent. Vt. Ry. Co., 26 Fed. (2d) 905, aff'd 26 Fed. 907, cert. den. 278 U. S. 624, 73 L. ed. 545.

The leading case is *Illinois C. R. Co. v. Behrens,* 233 U. S. 473, 58 L. ed. 1051. Appellant has undertaken to quote some of the language from that case. The isolated quotations are somewhat misleading. The court first points out what the power of Congress, under the Constitution, and with respect to regulation of interstate commerce, was. It is in this respect that the language quoted was used, the court pointing out that it entertained

> "no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regula-

tion by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

But the court did not stop here as appellant did. It went on:

"Passing from the question of power to that of its exercise, we find that the controlling provision in the Act of April 22, 1908, reads as follows:".

The court then quotes, and goes on:

"Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * * Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. * * * That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Dealing with this same question the Court of Appeals of New York in *Carey v. N. Y. C. R. Co.*, 250 N. Y. 345, 165 N. E. 805, said:

"The constitutional power to pass a statute is one thing, and the construction of a statute when enacted is another. The question before us here is not the constitutional power of Congress to extend the application of the Employer's Liability Act to operations less direct and immediate in their relation to interstate or foreign commerce. The question here is the meaning of the statute which it has chosen to adopt. * * * In adopting the Employer's Liability Act it chose to limit the protection by the nature of the present service."

Accord,

McBain v. Northern P. Ry. Co., 160 Pac. 654 (Mont.).

The second general proposition which, it is believed, is elementary, which is indicated if not expressed in so many words, in the above cases, but which is of the very highest importance is that the burden is upon the injured employee who seeks to avail himself of the federal act to show that his case is within the act. In *Johnson v. S. P. Co.,* 199 Cal. 126, 131, the deceased had been injured while riding on a cut of cars which were being switched. A nonsuit was granted and judgment affirmed upon the ground that it was not shown that these cars were moving in interstate commerce. The court said:

"The burden is upon the plaintiff in this action to establish the fact that the defendant, at the very time when its employee through its negligence received the injuries which caused his death, was engaged in interstate commerce, the presump-

tion being, in the absence of such proof, that the employer while in the use and operation of its railway within the state was engaged in intrastate commerce. (*Terry vs. S. P. Co.,* 34 Cal. App. 330, 169 Pac. 86; *Bradbury vs. Chicago, R. I. & P. Ry. Co.,* 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1; *Osborne vs. Gray,* 241 U. S. 16, 60 L. ed. 865, 30 Sup. Ct. Rep. 486, see, also, Rose's U. S. Notes Supp.)"

Accord,

Lockhart v. S. P., 91 Cal. App. 770;
Carey v. N. Y. C. R. Co., supra;
Martin v. St. L.-S. F. Ry. Co., 258 S. W. 1023 (Mo.);
Phila. & R. Ry. Co. v. Cannon, 296 Fed. 302 (C. C. A. 3d);
Baldassarre v. Penn. R. Co., 24 Fed. (2d) 201 (C. C. A. 6th);
Onley v. Lehigh V. R. Co., 36 Fed. (2d) 705 (C. C. A. 2d), cert. den. 281 U. S. 743, 74 L. ed. 1156;
Hench v. Penn. R. Co., 246 Pa. St. 1, 91 Atl. 1056;
Rogers v. Canadian N. Ry. Co., 246 Mich. 399, 224 N. W. 429;
Carter v. Mo. Pac. R. Co., 119 So. 706 (La.).

The importance of keeping the general principles involved in the foreground is because

"each case must be decided in the light of the particular facts with a view of determining

whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

N. Y. etc. R. Co. v. Carr, supra.

Now, as to what is interstate commerce within the meaning of the act. How is that question to be determined? The cases make it readily apparent that all activity of an interstate railroad, which may ultimately reflect upon or affect interstate commerce is not by that token alone itself interstate commerce. Thus, to take examples from activities in connection with supplying fuel, the mining of coal by an employee of an interstate railroad, which coal was to be used in engines while engaged in interstate commerce, is not interstate commerce. (*Delaware L. & W. R. Co. v. Yurkonis,* 238 U. S. 439, 59 L. ed. 1397.) So, where coal had come into a yard on cars and had been held in the cars on a storage track, movement of those cars to the coal shed, so that the coal could be put in bins and chutes, was not interstate commerce. (*C. B. & Q. R. Co. v. Harrington, supra; Lehigh V. R. Co. v. Barlow,* 244 U. S. 183, 61 L. ed. 1070.) In *Industrial Acc. Com'n v. Davis,* 259 U. S. 182, 66 L. ed. 888, the court said:

"The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are

accessories to that movement,—indeed, are necessary to it; but so are all attached to the railroad company,—officials, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act."

The leading statement of the test and the one most frequently quoted is that in *Shanks v. Delaware L. & W. R. Co., supra*, where the court said:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

This test was stated and applied in the United States Supreme Court cases which have already been referred to and references is made to them here.

A very useful statement of the rule, because in a case where the facts were practically the same as those in the case at bar, and because of its review of the leading federal cases, is found in *Hines v. Industrial Acc. Com'n,* 184 Cal. 1, 14, where the court said:

> "From the foregoing authorities these principles are deducible: The general test as to the character of the employment is whether the employee was engaged in an act so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof. Thus, where the instrumentality upon which he was working was operating exclusively in interstate commerce, as in the Parker and Szary cases; or where the work which he was performing at the time of the accident would have the immediate effect of furthering interstate traffic, as in the Carr, Rolfe, Butler, Porter, Smith, and Collins cases; or where the employee had not yet completed his day's work, which included both interstate and intrastate transportation, as in the Winfield case; or where the instrumentality upon which he was laboring was a car loaded with commodities consigned to or from other states, as in the Morton and Hancock cases, an action under the Federal Employers' Liability Act is the excluive remedy. But where the employee's work was only remotely connected with interstate commerce, as in the Yurkonis, Shanks, Harrington, Barlow, and Branson cases; or where the employee had completed a task which involved interstate traffic, and had not yet commenced a new task, as in the Welsh case; or where the instru-

mentality upon which the employee was working was, at the time of the injury, neither engaged in nor loaded with interstate traffic, as in the Winters case, then compensation may be awarded under a state compensation act. As was said by this court in the Butler case, 'the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation.' "

The leading cases are cited and classified in *Hallstein v. Penn. R. Co.,* 30 Fed. (2d) 594 (C. C. A. 6th), where the court said:

> "Where work is being done by an employee upon or directly in connection with an instrumentality which itself is being used in interstate commerce and not withdrawn therefrom, such as tracks, bridges, water tanks and pumps connected therewith, locomotives or cars embarked or immediately about to embark upon such commerce, or undergoing running repairs, etc., the employee has been held to have been engaged in interstate commerce. (Citing cases, to which might be added *N. Y. C. R. Co. v. Marcone,* 281 U. S. 345, 74 L. ed. 892.)
>
> "On the other hand, where the instrumentality upon which the employee is at work or in connection with which he is engaged is not directly connected with interstate transportation, or where such instrumentality has been withdrawn from or not yet dedicated to use in such commerce, although it may last have been so used or be intended ultimately for such use, it has repeatedly

> been held that the work was not so closely related to interstate commerce as to be practically a part of it. (Citing cases.)"

It is at once apparent that of the instrumentalities used by an interstate railroad there is a classification into two major groups. The first group represents permanent structures, such as bridges, tanks, the tracks themselves, and the like. They are permanent in nature. If assigned to any particular use they must necessarily be permanently assigned and take character from the use to which they are assigned. If they are assigned to any use which is interstate in nature, they are permanently so assigned. The fact that they may be also and coincidentally used for intrastate purposes does not change the permanent nature of their assignment to interstate purposes. But this does not apply to the second classification of instrumentalities such as cars and engines, which may be assigned from one type of traffic to the other from time to time, and accordingly may, from time to time, change character. This distinction has been recognized. See cases cited below, and, particularly, the following:

> *Minneapolis etc. R. Co. v. Winters,* 242 U. S. 353, 61 L. ed. 358;
>
> *Erie R. Co. v. Welsh, supra;*
>
> *Industrial Acc. Com'n. v. Davis, supra;*
>
> *Denver etc. Co. v. Ind. Com'n.,* 206 Pac. 1103 (Utah);

Hart v. Central R. Co., of N. J., 147 Atl. 733 (N. J.);

Payne v. Wynne, 233 S. W. 609 (Tex.).

The instrumentality here in question was an engine and falls into this second class.

There is a second distinction to be taken. The test stated in the *Shanks* case is twofold, and contemplates that an employee may be engaged in interstate commerce because engaged (a) in interstate transportation, or (b) in work so closely related to it as to be practically a part of it. The plaintiff in this case was certainly not engaged in interstate transportation, nor was he working on an instrumentality that was then engaged in interstate transportation. If he was engaged in interstate commerce it must be because he satisfies the second part of the test. This brings us to a consideration of the facts.

Most of the facts with respect to the question of interstate commerce were stipulated to, and that stipulation requires careful reading. It was stipulated as follows:

(1) At Colton, on the main line of this defendant, there was a switch yard. That switch yard was wholly within the State of California. (R., p. 28.)

(2) In that switch yard switching movements were made which were both interstate and intrastate in character. (R., p. 28.)

(3) The particular switch engine in question was assigned to the Colton yard. We call attention to the

fact that the only stipulation as to the assignment of this engine was, that it was assigned to the Colton yard. There was no stipulation that it was assigned to any particular type of traffic in that yard. (R., p. 28.)

(4) The engine was in fact used indiscriminately in interstate and intrastate commerce. (R., p. 28.) *Non constat* but that at any particular time selected it was engaged solely in intrastate commerce.

(5) On the particular morning in question this engine had been on the 7 o'clock shift. That shift normally terminated at 3 o'clock, but on this day there had been a little overtime carrying the shift to 3:10 or 3:15. (R., p. 29.) On that shift it was doing switching operations, and in the course of those switching operations was handling indiscriminately interstate and intrastate commerce, that is, one job, which was one, and then it would do another job, which was the other. (R., p. 47.) *Non constat* but that the last job it had done was an intrastate job. We again call attention to the fact that the burden of proof is on the plaintiff.

(6) That morning shift had been completed. *"The switching crew had brought the engine in and placed it on the roundhouse receiving track, and had left it, and the hostler had taken charge of it"*. (R., p. 29.) In this connection a stipulation was entered into as to the duties of a hostler.

> "Mr. Dunne. A hostler is a person who is *connected with the roundhouse,* and whose duty

it is to move engines in and out of the round-house for purposes of services, receiving them, and taking them out again *when* assigned to duty.

"The Court. *When the engines come off what we might call the live tracks.*

"Mr. Dunne. When they come off these switching tracks they are put on the *roundhouse receiving tracks,* and are left there by their crews and the hostler goes on the engine and does whatever is necessary about the *roundhouse,* moving the engine, spotting it and taking on supplies, running it over the turntable, and putting it in the roundhouse, itself, to put it to sleep."

(R,. pp. 48-49.)

See appellant's opening statement:

"A hostler is a man who takes care of the engines *after they are taken out of the daily service.*" (R., p. 26.)

(7) Walton, over objection, testified, that when he was injured he was preparing the engine "for the next shift that it went out on; I don't know whether it was eleven o'clock that night when *one* went out or seven o'clock the next morning; the engine was supplied for one of those shifts". (R., p. 30.) This testimony was objected to upon the ground that it was a mere conclusion, and that it was without foundation. But the greatest effect that can be given it is, that Walton was preparing the engine for the next work which it might do. There is no testimony that at that time it was assigned to any particular work. *Non constat* but that

the next work to which it would be assigned would be intrastate commerce. We shall point out that the next work that it in fact did is immaterial. The test is, was it assigned to any interstate work at the time of the injury? There is no proof that it was.

(8) It was stipulated over objection as to competency and materiality, on the engine's next shift it was engaged "in similar service"—that is, doing one job which was interstate commerce and then another job which was intrastate commerce. At the same time it was stipulated, "that at the time this accident happened, however, the engine had finished its work on the morning shift". (R., p. 47.) *Non constat* but that the first work on the new shift was intrastate work. There was no stipulation as to what work, if any, the engine was assigned to at the time of the accident. There was no stipulation even that it was then assigned to the eleven o'clock shift. The only stipulation was that when in fact it did go back into service, it went onto the eleven o'clock shift.

(9) The plaintiff further testified, that when the engine was spotted for oil he told the holster that, "we needed oil". (R., p. 31.) Evidently the engine could not have proceeded with further work.

This is what the record shows. Now, as to what it does not show:

(1) There is no showing as to what proportion of interstate or intrastate commerce was handled at any time in the Colton yard or by this engine.

(2) There is no showing as to the proportion of intrastate commerce handled by this engine on the morning shift and there was no showing what this engine's last move was—whether interstate or intrastate. Here again the plaintiff's proof failed.

(3) There is no showing that this engine was assigned to any job at all at the time of the accident, much less to an interstate job. The only showing is that it had finished one shift, had left the live tracks, and had gone onto the roundhouse receiving track, and had been left by its crew. It was out of service.

(4) There was no showing what the engine's next move was, when it in fact went back into service.

(5) There was no showing what other switch engines were available at the Colton yard, and whether at the time this engine finished its shift there was any necessity that it should ever go back into switching service there. It was not going out to a job. It was not on its way back from a job, but had come back and finished its movement in that behalf. There was no showing at the time of the accident it would ever have to go out on another job.

When the foregoing facts are measured by the test of the cases it is apparent that this engine was not permanently assigned to interstate commerce; that it was assigned to work which was first interstate in character, and then intrastate in character, and that plaintiff has failed to sustain the burden of proof that

at the moment in question it had an interstate character. It is also apparent that under the general test plaintiff was not engaged in work so closely connected with interstate commerce, "as to be practically a part of it". The cases which have dealt with analogous situations amply warrant this conclusion.

In the first place, the problem presented by a switch engine is considerably different from that presented by a road engine. A road engine assigned to an interstate run has an interstate character until that run is completed—until having left the roundhouse at which it is located it has made its round trip and returned to that roundhouse. Until it is back in the roundhouse and withdrawn from service it is doing a single and an indivisible task. With switching it is different. In *Erie R. Co. v. Welsh, supra,* as to whether or not a switch engine and its crew were engaged in interstate commerce, the court said:

> "And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task."

The court held that it was to be regarded as a series of separate tasks. Other cases have repeatedly held that in the case of switching operations, there is no "general work" which lends color to all of the work, but that a switching crew is engaged in interstate or intrastate commerce depending upon the work that it is doing at a particular time. There are points of time when it can be said that the engine, while in

actual operation, is not engaged in interstate commerce, but is engaged solely in intrastate commerce.

The leading case is *Illinois C. R. Co. v. Behrens, supra.* The intestate was a fireman and "member of a crew attached to a switch engine operated exclusively within the City of New Orleans". The court summarizes the facts as follows:

> "In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once, and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state."

It was held that at the time of the accident the deceased was not engaged in interstate commerce. We have already quoted from the case at some length.

See, *accord,* with the *Behrens* case, that there is no such thing as "general work" of switching, and that switching is not an indivisible task but a series of individual tasks, each having character of its own, the following:

Baldassarre v. Penn. R. Co., supra;
Shauberger v. Erie R. Co., 25 Fed. (2d) 297 (C. C. A. 6th);

Wise v. Lehigh V. R. Co., 43 Fed. (2d) 692 (C. C. A. 2d);
Shanley v. P. & R. R. Co., 221 Fed. 1012;
Hench v. Penn. R. Co., supra;
Meyer's Adm'x. v. C. & O. Ry. Co., 259 S. W. 1027 (Ky.);
Martin v. St. Louis-S. F. Ry. Co., supra.

We do not pause to consider these cases in detail because there are cases, which in the light of the foregoing principles, it will be seen are controlling here.

Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319:

The plaintiff was a yard conductor in defendant's Brier Hill Yard. He performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under orders of the yard master, and had to apply frequently to the latter for such orders. He with the yard crew moved an interstate car and a caboose and left the car on a siding. The caboose was then taken a short distance and placed on another siding. The engine then took water and returned to the Brier Hill Yard and slowed down to let Welsh go for further orders, all previous orders having been executed. It was while going for these orders that Welsh was injured. It appears that the orders he would have received would have required him to immediately make up an interstate train. It was held that he was not engaged in interstate commerce, and that "the mere expectation" that presently

he would be called upon to perform interstate work did not bring the case within the federal act.

This case is indistinguishable from the case at bar. See, for examples of cases following the *Welsh* case *Patterson v. Director General of Railroads,* 105 S. E. 746 (S. C.), and *Bishop v. Chic. J. Ry. Co.,* 212 Ill. App. 333.

Minneapolis etc. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358:

The facts in this case were agreed. Plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over defendant's line * * * which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury". It will be seen that this statement is a little broader even than the facts in the case at bar. It was shown that it had pulled a freight train into the town where plaintiff was injured, three days before the accident, and pulled one out of the same place on the day of the accident. The court said:

> "That is all we have, and it is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially for anything more definite than such business as it might be needed for. It was

> not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. *Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.*"

The facts in the case at bar are even stronger for than are the facts of the *Winters* case.
the non-application of the Employer's Liability Act

The *Winters* case was followed in the following cases:

- *Industrial Acc. Com'n. v. Davis, supra;*
- *B. & O. R. Co. v. Branson,* 242 U. S. 624, 61 L. ed. 534;
- *Chicago etc. Co. v. Kindlesparker,* 246 U. S. 658, 62 L. ed. 925;
- *Central R. Co. of N. J. v. Paslick,* 239 Fed. 713 (C. C. A. 2d);
- *O'Dell v. So. Ry. Co.,* 248 Fed. 343 and 248 Fed. 345, aff'd 252 Fed. 540 (C. C. A. 4th);
- *Davis v. B. & O. R. Co.,* 10 Fed. (2d) 140 (C. C. A. 6th).

CASES FOLLOWING THE RULE OF THE WELSH AND WINTERS CASES AND SUPPORTING THE PROPOSITION THAT THE ENGINE HERE WAS NOT AN INSTRUMENTALITY IN INTERSTATE COMMERCE.

The cases on the proposition that engines and cars are or are not at a particular time instrumentalities of interstate commerce are legion. It would serve no useful purpose to attempt to cite them all. We do, however, want to call attention to other cases which are of particular significance because of the similarity in facts.

In *Hines v. Industrial Acc. Com'n,* 184 Cal. 1, cert. den. 254 U. S. 655, 65 L. ed. 459, *sub nom Payne v. Industrial Acc. Com'n,* the California Industrial Accident Commission had made an award in favor of the heirs of one Brizzolara. It was contended that the Commission was without jurisdiction because the injury was received while the employee was engaged in interstate commerce. Brizzolara was a machinist's helper, "engaged in making repairs upon a switch engine, which had been temporarily withdrawn from service therefor". When in service this switch engine was used in both interstate and intrastate traffic. Brizzolara, at the time he was killed, was engaged in adjusting brakes on the engine. It was held that he was not engaged in interstate commerce, and the award was affirmed. The significance of the case lies in the fact that by overruling an earlier California case it brings the California cases in harmony with the *Welsh* and *Winters* cases. The dissenting opinion pointed out that the United States Supreme Court

had denied a petition for a writ of certiorari in the case overruled by the *Hines* case. It is significant, therefore, that in the *Hines* case itself, a petition for a writ of certiorari was denied.

In *Onley v. Lehigh V. R. Co.,* 36 Fed. (2d) 705 (C. C. A. 2d), cert. den. 281 U. S. 743, 74 L. ed. 1156, plaintiff, a brakeman, was working on a switching crew. After returning from his luncheon he was told to oil an engine, and was then directed to take the engine to a track and test the fire hose with which it was equipped. The engine was placed as ordered, and while the hose was being tested it burst, and plaintiff was injured. The sole defense was that plaintiff was not engaged in interstate commerce. "All the record shows concerning the character of his employment as being interstate or otherwise, is in a concession to the effect that both he and the engine had been engaged during the morning in interstate switching part of the time, and in intrastate switching part of the time, and that, but for the accident, the plaintiff would have worked during the afternoon at such switching as might have been required." The court held that plaintiff was not engaged in interstate commerce, and said:

> "The future is barren of assistance, for he was not employed in preparing for some definite movement, so that his work was a necessary incident of it, and became of like character with it; and nothing is known but that the plaintiff, and we may assume the engine, would have, in the ordinary course of events, done such switching

> as would have been required. We do not know what would have been required, except that it might have been wholly interstate switching, wholly intrastate, or partly both."

This of course fits our case. The court then looks to the past, and says:

> "We find nothing to indicate that any operation of the morning's interstate or intrastate switching was unfinished when the plaintiff stopped for lunch."

In our case it definitely appears that the morning shift was completed.

> "His next work in oiling the engine is as devoid of significance, in and of itself, as is testing the fire hose. (The court then points that, in any event, oiling had been completed.) The hose testing was a detached and isolated piece of work. * * * On the contrary, the fact that all previous work had been completed, and no particular work was contemplated, gave rise to the opportunity for taking time to test the hose, and it became a separate and distinct part of the day's work. * * *"

In *Chicago A. R. Co. v. Allen,* 249 Fed. 280 (C. C. A. 7th), cert. den. 246 U. S. 666, 62 L. ed. 929, the plaintiff was injured while working on one of defendant's engines. It was stipulated that this engine "had for a long time been used by it indiscriminately in both interstate and intrastate commerce", and that at the time of injury it was "intended by said defend-

ant to be used thereafter in interstate and intrastate commerce as occasion might require". It was held that plaintiff was not engaged in interstate commerce, the court following the *Winters* case and distinguishing *Pedersen v. Delaware etc. R.*, 229 U. S. 146, 57 L. ed. 1125, upon the ground that the bridge there involved, having once been dedicated to interstate commerce it was permanently so dedicated.

Giovio v. N. Y. C. R. Co., 162 N. Y. Supp. 1026, aff'd 223 N. Y. 653, 119 N. E. 1044. Action for the death of one Giovio. Immediately before the accident he had been coaling a switch engine which was used solely within the yard in switching cars engaged in interstate as well as intrastate commerce, and was so used indiscriminately. On the day of the accident it was used only in moving interstate cars and was so used on the following day. Before the accident the switch engine having finished its work for the day, dumped its fire in an ash pit, took water and proceeded to the coal chute to obtain coal. Deceased stood on the tender of the engine while it was taking coal. As soon as the coaling was finished the hostler started the engine toward the roundhouse, stopped for a minute and deceased attempted to alight. The hostler did not stop to see if he had alighted safely, but started again, and he was killed. Plaintiffs had a verdict. Judgment was reversed upon the ground that the deceased was not, at the time, engaged in interstate commerce. To the argument that the engine, before the accident, had been engaged in interstate

commerce, the court cited and followed the *Winters* case.

Accord,

Leslie v. Long Island R. Co., 224 N. Y. Supp. 737, aff'd 248 N. Y. 511, 162 N. E. 505.

Gray v. Chicago & N. W. Ry. Co., 142 N. W. 505 (Wis.), aff'd 237 U. S. 399, 59 L. ed. 1018. A hostler whose duty it was to service and supply engines was struck while walking through the yard of defendant. It was held that he was not engaged in interstate commerce, and the court said:

> "Taking care of an engine after it has completed its run, and preparing it for the roundhouse, seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce."

See, *accord,* and following the *Davis, Winters* and *Hines* cases:

James v. Chicago & N. W. Ry. Co., 211 N. W. 1003 (Neb.);

Kasulka v. L. & N. R. Co., 105 So. 187 (Ala.);

Payne v. Wynne, supra;

Connolly v. Chicago etc. Ry. Co., 3 Fed. (2d) 818;

Utah R. T. Co. v. Ind. Com'n., 204 Pac. 87 (Utah).

La Casse v. New Orleans etc. Co., 64 So. 1012 (La.). Here deceased was employed in defendant's roundhouse in receiving locomotives that came in, taking care of them, having them filled with water and steamed up ready for use. He was steaming up an oil burning locomotive when the crown sheet gave way and he was killed. The testimony as to this particular engine was, that it worked all the way between Houston and New Orleans; that it ran both ways out of De Quincy, a Louisiana town. The court said:

> "We do not understand this evidence to mean any more than that this locomotive, like any other locomotive of the defendant company, or any of its cars, might be and was sometimes used in interstate commerce."

The court then referred to two United States Supreme Court cases, and went on:

> "In those cases, although the connection was but slight, there was a direct engagement in interstate commerce, whereas a locomotive or an empty car, which has completed an intrastate run and may on its next run be used in like manner intrastate, can not be said to be actually engaged in interstate commerce."

See, *accord,*

McBain v. N. P. Ry. Co., 160 Pac. 654 (Mont.); *Chicago etc. Co. v. Ind. Com'n.,* 123 N. E. 278 (Ill.), cert. den. 250 U. S. 670, 63 L. ed.

1199, where deceased was killed while washing out an engine in the roundhouse, where the engine was sometimes used in intrastate commerce and where it had not been assigned to any particular train at the time.

Boals v. Penn. R. Co., 193 App. Div. 347, 183 N. Y. Supp. 915. A roundhouse employee was injured dumping ashes from an engine which had come in hauling an interstate train. The transportation of that train was finished. The engine was not under orders for the next trip. The court said that it could not be said, therefore, that the employee, when injured, was engaged in interstate commerce, relying on the *Behrens* and *Welsh* cases.

Again, in *Conklin v. N. Y. C. R. Co.,* 206 App. Div. 524, 202 N. Y. Supp. 75, aff'd 144 N. E. 895, an engine was used indiscriminately in interstate and intrastate commerce. Its last work before the accident was to haul an interstate train. Plaintiff was injured while working on it in the shop. It was held that the plaintiff was not engaged in interstate commerce, the court saying:

> "The use of an engine indiscriminately for interstate and intrastate commerce does not give character to the engine as an instrumentality of interstate commerce, so that a person injured upon that engine when not engaged in interstate commerce may recover damages under the federal Employer's Liability Act. (Citing the Behrens, Winters, Davis and Shanks cases.)"

Bissett v. Lehigh V. R. Co., 132 Atl. 302 (N. J.) aff'd. 134 Atl. 915, cert. den. 273 U. S. 738, 71 L. ed. 867. A switch engine's pump needed repair, and the crew were directed to place it on the repair track, which was also used for yard purposes. This was done. The deceased then climbed on the engine to make the repairs and while so engaged fell off, was injured and died. The repairs were finished that day by a helper, and the engine put back on the work which had been interrupted by the pump trouble. An award was made under the State Act on the ground that the deceased was engaged in intrastate work. This award was affirmed on the authority of the *Winters* case and New Jersey cases which were cited.

Birmingham Belt R. Co. v. Ellenburg, 104 So. 269 (Ala.), cert. den. 269 U. S. 569, 70 L. ed. 416. Plaintiff was the foreman of a switching crew, which was engaged in switching both interstate and intrastate cars. During the shift the engine became disabled, and the plaintiff and his crew took it to the roundhouse. On completion of the repairs the plaintiff and his crew started back with the engine to finish the work they had stopped. On the way back plaintiff was injured. This happened about an hour and a quarter from the time when the engine first became disabled. The court held that the plaintiff was not injured while engaged in interstate commerce, saying, in following the *Behrens* case:

> "In that case there was a temporary dissociation from interstate commerce. Here there was

a temporary dissociation from commerce of any character. In the Behrens case the engine was hauling cars loaded with intrastate freight, but had a definite assignment to bring back interstate cars. Here the engine was going back to its work of moving interstate and intrastate cars indiscriminately."

In *Patterson v. Director General of Railroads,* 105 S. E. 746 (S. C.) plaintiff was the conductor in charge of a switching crew. He had been switching interstate cars. These movements had been completed, and he had stopped his engine to let a train pass. It was while this train was passing that he was injured. It was held that he was not engaged in interstate commerce.

In *Narey v. Minneapolis etc. R. Co.,* 159 N. W. 230 (Iowa), the plaintiff was working on an engine preparing it for a trip. He was attached to defendant's roundhouse at Marshaltown, Iowa. The defendant was an interstate road, and the engines which operated out of this roundhouse were used in interstate commerce. No showing was made, however, as to what was to be done with engine 446, on which plaintiff was working at the time he was injured. It was held that he had failed to make out a case under the federal act.

With the foregoing cases as to engines should be compared the cases holding that cars, although used from time to time in interstate commerce, are not

instrumentalities in interstate commerce after they have finished one run and before they have started or have been definitely assigned to another interstate run. In *Klar v. Erie R. Co.,* 162 N. E. 793 (Ohio), the court said:

> "The claim that the plaintiff was engaged in interstate commerce must rest upon the theory that, the service of this car next preceding the making of repairs thereon, having been interstate in character, such was the status of the car at the time the repairs were being made. This theory is not supported by the decisions of the Supreme Court of the United States. * * * This car was not devoted solely to interstate purposes. It had been so used, but that use had entirely ceased, and it was placed upon the tracks for further disposition, and during that period, it, of course, was not assigned to any service. The nature of the next or further use of the car was a matter of future determination, controlled, no doubt, by the source of the demand therefor."

See, *accord,* cases of unassigned cars, which were simply awaiting a further assignment and this not by reason of necessity of any repairs:

Schauffell v. Director Gen. R. R., 276 Fed. 115 (C. C. A. 3rd);

Johnson v. S. P. Co., supra;

Carey v. N. Y. C. R. Co., supra;

Wise v. Lehigh V. R. Co., 43 F. (2d) 692 (C. C. A. 2d).

In *Hulse v. Pac. etc. Co.*, 277 Pac. 426 (Idaho), where a section man having finished his use of a motor car was towing it to return it, the court said:

> "The general nature of the employee's duties is not determinative of this question. Inquiry must be directed to the particular employment at the precise time of the accident. * * * The rule appears to be that, when a car or other instrumentality of commerce has completed its interstate business, and has not yet been designated specifically for further interstate business, an employee engaged in switching or otherwise handling it, is not engaged in interstate commerce."

Davis v. B. & O. R. Co., 10 Fed. (2d) 140 (C. C. A. 6th) arrives at the same result where repairs were being made on a car coupler, and the next movement of the car was to be to a point from which it would be used either interstate or intrastate commerce as business might require.

See, *accord*,

Rogers v. Canadian Nat. Ry. Co., 224 N. W. 429 (Mich.);
Hart v. Cent. R. Co., of N. J., 147 Atl. 733 (N. J.);
Price v. Cent. R. Co., of N. J., 123 Atl. 756 (N. J.);
Herzog v. Hines, 112 Atl. 315 (N. J.);
Mayers v. Union R. Co., 100 Atl. 967 (Pa.).

APPELLANT'S CASES.

Appellant's citation and quotation of *N. Y. C. R. Co. v. Marcone,* 281 U. S. 345, 74 L. ed. 892, is not helpful. The facts upon which the determination that the engine in question was an instrumentality in interstate commerce was founded are not stated. It is simply stated that the engine was used in hauling interstate trains and was not withdrawn from service. On such statement alone the case is wholly distinguishable. An examination of the report of the opinion of the New Jersey court is no more helpful. It is there said simply that, "He had been told to finish his work on an engine in interstate commerce". 144 Atl. 635.

In *N. Y. C. R. Co. v. Carr, supra,* the accident happened while a member of the crew of an interstate train was cutting two intrastate cars out of that train. There was no question but that the train as a whole was an interstate train, and he was working in connection with that train. The facts have no similarity to those of the case at bar. And, compare, as indicating the limit to which the *Carr* case is confined, *Mayor v. Cent. Vt. Ry. Co., supra.*

Erie R. Co. v. Collins, 253 U. S. 77, 64 L. ed. 790, was a case in which an employee was engaged in a signal tower and water tank of a railroad company, which was used in connection with interstate and intrastate trains. It was, then, a structure permanently devoted to interstate commerce. The accident happened

while the employee was endeavoring to start a gasoline engine used in pumping water into the tank. He was, then, working on an instrumentality permanently devoted to interstate commerce, and the case fell within the rule of *Pedersen v. Delaware etc. Co., supra.* That was a case where the employee was working on a bridge used by interstate trains. *Erie R. Co. v. Szary,* 253 U. S. 86, 64 L. ed. 794, decided the same day as the *Collins* case, simply follows that case where the employee was engaged in working at the "sand house" where sand was prepared and stored for interstate engines.

Erie R. Co. v. Van Buskirk, 228 Fed. 489, 279 Fed. 622, 1 Fed. (2d) 70 (C. C. A. 3d), was appealed three times. The first opinion was rendered in 1915. Considerable water has run under the bridge since then. The leading United States Supreme Court cases were decided after that time. In the first opinion it appears that a hostler was injured. He was injured after he had left a particular engine. The question as to whether or not that engine was an instrumentality in interstate commerce was mildly suggested, but not decided, the court deciding the case for the defendant on a distinct ground. The following is the only discussion of the question, whether or not the engine was an instrumentality in interstate commerce, when in charge of a hostler:

> "*Assuming, for present purposes,* that one engaged in such work was employed in interstate commerce, as contemplated by the act, the

> fact is that the defendant did not meet his death while doing any act in or about the hoisting of an engine."

The word "defendant" is evidently used through an inadvertence, and what is intended is, plaintiff's intestate, or deceased.

On the second appeal it appeared that the engine was a switch engine used indiscriminately in interstate and intrastate commerce, and was turned over to the deceased, "for preparation for further work". Again, the case turned upon whether or not, having left the engine to go elsewhere the deceased was still engaged in interstate commerce. There is no discussion as to whether or not the engine was an instrumentality in interstate commerce. The court said:

> "The engine was admittedly an instrumentality of interstate commerce, and when Van Buskirk took charge of it, to have it supplied with coal, sand, and water, he was engaged in such commerce. The case turns upon whether or not, when he got down from his engine and went over toward the Brown hoist and shanty, he was still engaged in interstate commerce."

The very matter which is in issue here, then, was admitted in the *Van Buskirk* case. The facts which inspired this admission are not shown. But whatever the facts were the point was assumed not decided.

On the third trial it was said that the evidence on this point "is substantially identical" with that on the

earlier trials. The point is again simply assumed on the basis of the earlier opinions. There is not only no independent discussion of the point, there is no discussion of the point at all.

We have been unable to find any such case as "*Southern Ry. Co. v. Peters,* 60 So. 611".

There is, however, a case, *Southern Ry. Co. v. Peters,* 69 So. 611, and we assume this is the case referred to. This case does not assist appellant. The employee there was working on a coal chute used to coal interstate trains. He was, therefore, assigned to an instrumentality permanently devoted to interstate commerce. In this respect the case is like the *Collins* case. But more than that, it appeared "that the next train expected was an interstate one". The holding of the court is expressed as follows:

> "Supplying coal to an engine, by a servant employed to do so, where such engine is attached to, and used in pulling, interstate trains, is as essential commerce as is running or repairing the engine."

In *Salvo v. N. Y. C. R. Co.,* 216 App. Div. 592, 215 N. Y. Supp. 645, the fire box of an engine was being cleaned. It took from twenty to thirty minutes to do this, and when done the engine was immediately returned to its duty. The engine in question was one of seven used principally in interstate commerce. It did not appear what particular service the engine in question was doing on the day of the accident. The

court turns the case on two propositions. It says first: "The engine in this case was no more withdrawn from service than an engine which stops to fill its water tank or which stops to take on coal for fuel, or one whose wheel boxes are greased and inspected while stopping at a station." And if this engine had been engaged in interstate commerce the holding on this ground is understandable. The court further says that the service of the deceased, "was really a plant service", and it likens him to the men in the *Collins* and *Szary* cases. Such a holding is understandable if supported by the facts. But the case goes on:

> "We do not think that whether or not the engine upon which the deceased was employed when he met his death had been assigned immediately to interstate commerce determines the character of his employment."

If this is the real basis of the holding of the case, then, clearly, the case can not be supported. It is in square conflict with the multitude of cases already cited. It is interesting to notice that the New York courts have apparently receded from the position of this case, for in a similar case, although this case was relied upon by the dissent, a contrary result was arrived at. (*Leslie v. Long Is. R. Co.,* 224 N. Y. Supp. 737, aff'd. 162 N. E. 505. And see the other New York cases above.)

CONCLUSION AS TO THIS PHASE OF THE CASE.

It is now respectfully submitted that the proof in this case fails in several important respects. It does not appear that the last work of this engine was not intrastate commerce. The burden of proof is on the plaintiff. It does not appear that the first work done by this engine after the accident was not intrastate commerce. It does appear that this engine had definitely finished its shift, had been left by its crew on the roundhouse receiving track, and had been withdrawn from service until it should be reassigned to some shift. It does not appear that it was assigned to any work, much less interstate work, at the time of the accident. It is, accordingly, respectfully submitted, that at the time of the accident this engine was not an instrumentality in interstate commerce, and plaintiff was not engaged in work so closely related to interstate commerce as to be practically a part of it.

APPELLANT IS ESTOPPED TO ASSERT ANY CLAIM UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

After plaintiff's injuries were received he was brought to the Southern Pacific Hospital. While there he had a discussion or a talk with some man from a Mr. Newman's office, who was a claims agent. (R., pp. 38-41.) After that conversation he received a voucher check. (R., pp. 41-42.) Later he received two such other voucher checks. These were offered

and received in evidence as Defendant's Exhibits A, B, and C. (R., pp. 42-43.) The original of these exhibits were ordered certified to this court as part of the record herein. (R., p. 58.) The plaintiff and appellant further testified that he or his wife for him endorsed his name on these voucher checks, and that he received the payments called for by them.

These voucher checks show that they were given and received as compensation to the appellant under the terms of the California Workmen's Compensation Act. Their provisions are plain. If appellant's case fell under the Federal Employer's Liability Act, the state act could have no application. If his case fell under the federal act then the defendant might be under no liability to him at all, for it might appear, as it does appear on this record, that the employer was not guilty of any negligence, that there was no violation of any federal safety statute, or that the employee had been injured as a consequence of a risk which he had assumed. The state act is an insurance act—the employer is liable in any event, and whatever the cause of the injury, if it grew out of the employment, with minor exceptions not now important. It is apparent, then, that if there is a question whether or not a railroad employee comes under the state act or the federal act, and the employer agrees with him that the case falls under the state act, the employer is giving up a position of possibly no liability for one of assured liability. The employee is assured of and receives payments which it might turn out, as it did

here, he would not have been entitled to if the case fell under the federal act.

This is what happened in the instant case. The employee agreed that the case fell under the state act when he accepted these vouchers, and the payment called for by them. When the employer made those payments it changed its position to its prejudice. The employee can not accept the fruits of the state act, and at the same time endeavor to maintain under the federal statute what is in effect a common-law action, with certain modifications by way of curtailing the defenses available to the employer, and in some instances imposing an absolute liability on account of defects in certain appliances.

The receipt and realization of these checks and vouchers was more than a mere waiver or mere election. By reason of the defendant's change of position and the benefit received it operates as an equitable estoppel. But more, the transaction is actually a contract of settlement of the rights of the parties. This is not a case where an unsuccessful appeal to the state act was made. Such a case would be distinguishable. See *Conrad v. Youghiogheny, etc. Co.,* 140 N. E. 482 (Oh. St.), where an administratrix was held not estopped by an adverse finding of the Commission operating under a state act. The court said, however:

> "Had the finding of the commission been in her favor, or *had she accepted compensation under the act, an estoppel would arise,* since she could not thereafter consistently sue on the theory

that the deceased was not covered by the act. *One can not pocket the fruits of the act and later disclaim it.*"

The principles involved are not new. We shall not extend this already somewhat extended brief by detailed discussion of them or citation of the leading cases for the basic principles. We simply call attention to those cases which have applied the principle to injured employees who have accepted compensation under compensation acts of the various states.

Sunlight Coal Co. v. Floyd, 26 S. W. (2d) 530 (Ky.);
The Fred S. Sanders, 212 Fed. 545;
Davis v. H. P. Cummings Const. Co., 129 Atl. 729 (N. H.);
Talge Mahogany Co. v. Burrows, 130 N. E. 865 (Ind.);
Spelman v. Pirie, 233 Ill. App. 6;
Allen v. Am. Mill Co., 209 Ill. App. 73;
Mitchell v. L. & N. R. Co., 194 Ill. App. 77;
Brassell v. Electric W. Co., 145 N. E. 745 (N. Y.);
Nyland v. N. Packing Co., 218 N. W. 869 (N. D.);
Sotonyi v. Detroit City Gas Co., 232 N. W. 201 (Mich.);
Stricklen v. Pearson Const. Co., 169 N. W. 628 (Ia.);
The Princess Sophia, 35 Fed. (2d) 736;
Matheny v. Edwards etc. Co., 39 Fed. (2d) 70 (C. C. A. 9th).

There is nothing in the Federal Employer's Liability Act making inapplicable the principle that an employee may so act in view of state compensation acts as to forego other remedies. The only provision of the act which could have any possible application is § 5 (45 U. S. C., § 55). This invalidates any form of agreement or device by which an employer attempts to avoid liability under the act. But this, it has been definitely established, applies only to agreements or devices which antedate injury. After injury and the definite vesting of the employee's rights, he can deal with those rights as he pleases, and can release them on a consideration. There is no restriction on his power to relinquish these rights after he has been injured.

Patton v. Atchison etc. R. Co., 158 Pac. 576 (Okl.);
Anderson v. Oregon etc. Co., 155 Pac. 446 (Utah);
Panhandle etc. Co. v. Fitts, 188 S. W. 528 (Tex.);
Mitchell v. L. & N. R. Co., supra;
Ballenger v. So. Ry. Co., 90 S. E. 1019 (S. C.);
Kusturin v. Chicago etc. Co., 122 N. E. 512 (Ill.);
Lindsay v. Acme etc. Co., 190 N. W. 275 (Mich.).

The employee can release his rights for a lump sum payment. He could agree to do the same thing in return for a specified number of periodic payments. Those periodic payments can be determined by ref-

erence to a state compensation act. He can release his rights in return for such payment determined by reference to such act. This is what he did here.

Incidentally, it should be pointed out, that the California act is a general statute, all embracive, and that one seeking to avoid its application must affirmatively show an exception. It is not an elective act requiring, first, a showing of an election, to accept its provisions, before it applies. Where it applies it excludes all other remedies.

> *Helm v. Great Western M. Co.*, 43 Cal. App. 416 (hearing by Supreme Court denied);
> *McLain v. Llewellyn Iron Works*, 56 Cal. App. 60 (hearing by Supreme Court denied);
> *DeCarli v. Associated Oil Co.*, 57 Cal. App. 310;
> *Lockhart v. S. P. Co.*, 91 Cal. App. 770;
> *Sarber v. Aetna etc. Co.*, 23 Fed. (2d) 434 (C. C. A. 9th).

CONCLUSION.

It is now respectfully submitted that the judgment should be affirmed:

Upon the ground that the plaintiff has failed to show any negligence or the violation of the Boiler Inspection Act, or that there was any proximate causal connection between any assumed negligence or violation of statute and any injury;

Upon the ground that there was no error in striking out the conclusion of the plaintiff;

Upon the ground that the plaintiff was not engaged in interstate commerce, and, consequently, the state compensation act, being a general statute applies; and

Upon the ground that the lower court had no jurisdiction in this: That there was a failure to prove diversity of citizenship (plaintiff's wife testified that in July, 1930, they were living in Oakland, but this is the whole of her testimony, and falls far short of proof that the plaintiff was a resident of California or any state other than Kentucky, at the time the action was commenced); and for the reason that, there being no showing that plaintiff was injured while engaged in interstate commerce, the only other ground upon which a federal jurisdiction could be founded has failed.

The appellant upon whom rests the burden of showing error has failed here to sustain that burden, as he failed to sustain the burden of proof below. The judgment should be affirmed.

Respectfully submitted,

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Dated at San Francisco, California, June 6th, 1931.